



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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In Reply Refer To:
4100(P)
09010
(CA-690.21)

May 15, 2001

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear Mr.:

INTRODUCTION

The Kessler Springs Allotment, #9010, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current lease authorizes 1,042 animal unit months (AUMs) year long on the BLM-administered Kessler Springs Allotment. The allotment encompasses 15,054 acres of private, State, and BLM administered (public) lands. Of the 14,161 acres of public land within the allotment, there are 11,901 acres of critical habitat and 2,616 acres of non-critical habitat for the desert tortoise.

This final decision for the Kessler Springs Allotment, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotment to protect the desert tortoise and its critical and non-critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the Proposed Decision was received for the Kessler Springs Allotment and comments were received on the EA. Comments received for the EA were analyzed and incorporated into the decision record which is enclosed. I have considered the protest's statement of reasons as to why you believe the proposed decision was in error and have responded to

these reasons, below.

RESPONSE TO PROTEST STATEMENT OF REASONS

Protest

“The Foundation is formally protesting the above referenced grazing decision on a single item. This past winter, the Foundation acquired the grazing lease at Kessler Springs and the previous lessees have been removing their cattle systematically. Its purchase contract gave the former lessees the obligation to have the cattle removed from this allotment by December 14, 2001. The former lessees cannot complete removal of all cattle from the allotment until June 1, 2001. They are aware of the Bureau’s settlement of the desert tortoise litigation and expedited the removal of cattle, but simply do not the staffing necessary at the moment to complete the removal until June 1, 2001.”

The Foundation respectfully requests the at that above grazing decision not go into effect until June 2, 2001.”

Response

This grazing decision will become effective 30 days after receipt, and will, therefore, take effect after June 2, 2001.

FINAL DECISION

After further analysis, it is my Final Decision that cattle grazing will not be authorized in the area of exclusion which encompasses 14,514 acres of critical and non-critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, and 43 CFR § 4130.3, 4130.3-3, 4110.1(b)(1)(ii)(iii), and other authorities which are described in the Authority section of this decision. These modifications on the Kessler Springs Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If, during the total exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see Authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This Final Grazing Decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment or January 31, 2002, whichever shall be later.

Applications received to graze during years of approved non-use on the Kessler Springs Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM-administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM’s understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM’s decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire’s thrasher, Le Conte’s thrasher, spotted bats, Townsend’s big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of

native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from OHV, mining and other activity in the desert.

BLM's decision is needed to ensure protection the desert tortoise and critical and non-critical habitat. This need outweighs the minor and temporary adverse impacts that would result to ranching from the closures. The decision will result in the temporary removal of livestock grazing from 14,517 acres of critical and non-critical habitat for the desert tortoise habitat within the BLM-administered Kessler Springs. BLM recognizes that the affected allotment provides a source of income and employment to the ranching community in the region and contributes goods and services to the area.

The Kessler Springs lessee may utilize other options including placing livestock on private pasture, if available, or removing all of the livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

Under your current circumstances on the Kessler Springs Allotment, it is difficult to predict the amount of labor force needed to effectively move cattle out of the closed areas. This decision may effect the current employment of your ranch operations.

AUTHORITY

The authority for this decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section”.

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b) (1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice to the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

43 CFR 4150.2(d): “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Needles Field Office, 101 West Spikes Road, Needles, CA 92363

within 30 days following receipt of the final decision. The appeal shall state the reasons, clearly and concisely, why the appellant thinks the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to include a petition for stay with your appeal, you have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Molly Brady

Needles Field Office Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record

Map



United States Department of the Interior

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May 15, 2001

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NOTICE OF FINAL GRAZING DECISION

Dear Mr.

INTRODUCTION

The Valley View Allotment, #9000, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #46900, authorizes 424 animal unit months (AUMs) year long on the portion of the Valley View Allotment administered by BLM. The allotment encompasses 33,227 acres of private, State, and BLM lands. Of the 32,260 acres of BLM administered public land, there are 5,779 acres of desert tortoise critical habitat and 26,281 acres of non-critical habitat within the allotment.

This final grazing decision for the Valley View Allotment, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA). In October 1994, the California Desert Protection Act was enacted that split administration of the Valley View Allotment between the BLM and U.S. National Park Service. At that time 95% of allotment was transferred to the National Park Service and designated as the Mojave National Preserve.

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA), which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotment to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle

use. Timely protest(s) to the Proposed Decision for the Valley View Allotment and comments on the EA were received from the Budd-Falen Law Offices, P.C. on your behalf. Protests were received for this allotment and for the EA. Comments on the EA have been analyzed and responses incorporated into the enclosed decision record. I have considered the protest's statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons, below.

RESPONSE TO PROTEST STATEMENT OF REASONS

These responses apply to the Valley View Allotment.

1. Protest:

“As stated above, Blincoe’s ranch has private land, state leased land and federal land. Most of this land is intermingled and not separately fenced. Blincoe and his predecessors have developed numerous water rights and other improvements on his ranch. Development of these improvements has required an extensive capital investment. The water developed on the ranches is used by both wildlife and livestock. The BLM proposed decision tries to limit Blincoe’s use of his private land and water rights by locating areas to be protected for the desert tortoise about his water sites. It would not be possible to fence the livestock off the areas to be protected for the desert tortoise as described in the Proposed Decision. Even if these fences could be built, without access to water, the rest of the range would be useless for livestock grazing.”

“The two BLM Proposed Decisions constitute a “taking” of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Blincoe’s private property, including private water rights and private improvements without due process and payment of just compensation. In this case, forcing Blincoe to eliminate livestock use on his private and leased lands and forcing him to “turn off” his water or fence his livestock off water is a “takings”. Even the federal court and administrative cases which discuss the “trespass” of livestock on BLM lands state that the BLM cannot “assume” trespass from existence of livestock grazing on unfenced private lands. Again, the BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements with this decision.”

Response:

This decision affects public land within the exclusion area as described in the Decision of Record on the Valley View Allotment administered by BLM. The BLM has no jurisdiction on private land, and it is not the intent of this decision to regulate or limit the use of private property, including private property rights on private land adjacent to the area of exclusion.

Approximately three sections of private land are located within the BLM administered Valley View Allotment. Other private or leased land which Blincoe uses as base property is located outside of the allotment. This decision would not directly affect private ownership, but could indirectly impact grazing use of these lands if they were located within the exclusion area since this decision would preclude cattle from accessing any adjacent public land within the excluded area.

Our records show that Mr. Blincoe has water rights on Kessler Springs and Cut Springs, which are located outside of the exclusion area. The BLM does not have any jurisdiction over water development or use on private, State or other federal lands and these water rights will not be directly infringed by this decision. However, if Blincoe has water rights for a source of water on public lands within the area of total exclusion, this decision will prevent cattle from accessing these developed sources of water.

Range improvements on public land established under a range improvement permit (BLM Section 4 permits) on the Valley View Allotment include the Yates Corral development (#0372). For this type of permit, Blincoe owns the physical improvement but the location and construction of the facility are authorized by the BLM. This improvement includes a water source and is located outside of desert tortoise critical habitat and the exclusion area. Other range improvements on the Valley View Allotment include the Nipton Road Pipeline (#4069), authorized under a BLM Cooperative Agreement for Range Improvement (4120-6). This is a water source for both the Valley View and Kessler Springs Allotments. The development is located within desert tortoise critical habitat and the exclusion area, and Blincoe's cattle would not be able to use this improvement during the exclusion period. BLM has the authority to determine the use of range improvement under 43 CFR 4120.3-1 (c), which states, "The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title."

The BLM is not requiring nor proposing Mr. Blincoe to construct any new range improvements on the Valley View Allotment under this decision. In addition, no modifications or construction of new range improvements are proposed under this decision. The BLM is not requiring nor proposing Mr. Blincoe to turn off or fence off any water on private land under this decision.

BLM has the authority (BLM v. Holland Livestock Ranch et.al., 39 IBLA 272 (Feb. 15, 1979)) to assume trespass on public lands based on the presence of livestock on unfenced private lands within the exclusion area during the excluded period.

2. Protest:

"Blincoe currently runs 395 head of mother cows on the ranch in normal precipitation years. Most of these calves are born from March 1 to June 1. Moving livestock at this critical time will result in significant weight loss, health problems, and animal deaths. It would take approximately four to six weeks to move 85% of these livestock. The remainder of the livestock would take a significantly greater amount of time to remove from the allotment."

"Forcing the permittee to move livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths."

Response:

The Bureau recognizes that this is a critical period in animal husbandry for a cow-calf operation. However, this period also coincides with crucial activities of the desert tortoise such as foraging to meet nutritional needs and reproduction requirements. Increased planning and early, gradual movement of

livestock out of exclusion area should reduce any potential weight loss, health problems and animal deaths.

3. Protest:

“Blincoe’s ranch uses one full time employee and six part time employees. If this decision is enforced, Blincoe’s employees will be terminated.”

Response

This action may disrupt livestock operations for the excluded portion of the Valley View Allotment during the interim period.

4. Protest:

“Richard Blincoe was simply presented with a copy of the Environmental Assessment (“EA”) on or about April 9, 2001. Nowhere in the documents sent to him was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to Blincoe’s knowledge and belief, this document was never been issued in draft, Blincoe assumes that this is a draft EA and that he is allowed the right to comment pursuant to 40 CFR 1503.1. Blincoe was only made aware of his opportunity to comment when his counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to Activists urging that they comment on the EA and support the no grazing alternative.”

Response:

Mr. Blincoe was supplied a copy of the proposed decision by certified mail. Mr. Blincoe, long with other interested parties, was mailed a copy of the EA separately. The documents were both mailed at the same time to allow for a concurrent 15 day public review and a 15 day protest period at the same time.

According to 40 CFR 1503.1, public comment is a requirement after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared therefore, 40 CFR 1503.1 is inapplicable.

In addition, you were given the opportunity as described in the proposed decision that your protest should specify clearly and concisely why you think the proposed decision, and the underlying EA, is in error.

5. Protest:

“Blincoe is authorized by the BLM to graze on the Valley Wells and Valley View Allotments year around. There is no rational basis to limit livestock on these allotments if there is no decline nor proven adverse impact to tortoise habitat.”

Response:

The Valley View Allotment is within critical habitat for the desert tortoise. Until consultation with FWS

of the CDCA Plan as a whole is completed and the BO implemented, the limiting of livestock use during certain seasons on the allotment is considered necessary by the BLM. This decision would also ensure additional protection of other BLM California sensitive wildlife species, special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species.

6. Protest:

“The BLM also limits use on certain parts of Valley View Allotment simply because they are not separately fenced from another allotment. The BLM regulations prohibit this action. Because the area on the Valley View allotment is open to grazing, grazing use should occur. Again the BLM cannot “assume” trespass from the existence of livestock grazing on unfenced lands. Again, BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements with this decision.”

Response:

Although the proposed decision addressed the entire BLM administered Valley View Allotment, this decision only excludes cattle grazing on 5,779 acres of BLM administered critical desert tortoise habitat within the Valley View Allotment. Private lands, private water rights, and Range Improvement Permits are discussed in the response to protest point A.

8. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.”

Response:

Currently, there is no injunction against grazing in the CDCA. The BLM has prepared an EA in these interim grazing restrictions and is consulting with the FWS on the overall plan..

9. Protest:

“The range condition on Blincoe’s allotments is stable or upward condition. The BLM has presented no factual, monitoring, or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possesses monitoring or other data to justify the reduction. The BLM has no such data in this case.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper

range management or assist in the orderly administration of the public rangelands.

10. Protest:

“The Proposed Decision and EA advocate the elimination of grazing in “noncritical habitat areas.” This is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in non critical habitat areas. These areas do not exist as a matter of law.”

Response:

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas. See 43 CFR 4130.3-2 in the above response.

11. Protest:

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.”

Response:

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e. actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

As defined in the Endangered Species Act, the term “take”and implementing regulations (50 CFR 17) means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e. where grazing persists) than inside the cattle exclosure (where livestock were excluded). He also observed that

tortoises located outside the cattle enclosure remained outside of their burrows all night significantly more often than tortoises located inside the enclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle enclosure than inside the enclosure.”

For the above reasons, the appellants statement is neither accurate with respect to direct “take” (i.e. killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

12. Protest:

“Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Blincoe’s operations. Even if he is able to secure the private pasture for his livestock “recommended” by the EA, he will loose the extensive capital investment in his ranches.”

Response:

The BLM anticipates that these interim actions may result in a disruption to the livestock operations for the allotment.

13. Protest:

“Blincoe’s livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell his livestock, he will never be able to achieve the quality of livestock he has now.”

Response:

Comment noted. If a lessee sells livestock, replacement heifers and livestock purchased from adjacent ranches may be available to replace the portion of livestock that was sold. The BLM acknowledges that cattle born and raised in the CDCA are better adapted to desert conditions.

14. Protest:

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is eliminating grazing on desert tortoise not bighorn sheep habitat in this decision.

15. Protest:

“The BLM has no legal, statutory or regulatory authority to physically move any of the permittees’ livestock at any time considered harassment of livestock and will be reported to the local authorities. Any attempted movement of the permittee’s livestock by any employee of the BLM or member of the public will be considered harassment of livestock and will be reported to local authorities.”

Response:

The BLM has legal authority to physically remove a permittee’s or lessee’s livestock under certain

conditions. If necessary, the BLM will comply with the following authorities if necessary.

This authority is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

16. Protest:

“The BLM has no authority to force the permittee to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittee to construct any physical improvements without compliance with the federal statutes and regulations can not stand.”

Response:

The BLM is not requiring nor proposing Mr. Blincoe to construct any new range improvements on the Valley View Allotment under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements. NEPA will be completed for those projects on other allotments listed in the EA following BLM administrative procedures.

17. Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has ample authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

(a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]

(b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added.]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part.
[Emphasis added.]

18. Protest:

“The BLM has failed to adequately discuss (consult, cooperate, or coordinate) any of these proposed actions with the affected permittee in violation with 43 CFR 4110.3-3(a).”

Response:

During the preparation of the EA, a conversation with Blincoe’s ranch manager on the subject was held in April of 2001, however Blincoe’s ranch manager is in the process of leaving. A conversation was held with Blincoe in April.

19. Protest:

“The BLM may only require that a permittee maintain those range improvements that directly benefit his livestock operation. The BLM’s requirement that the permittee maintain a proposed improvement when those improvements will not benefit his operation is a violation of agency requirements.”

Response:

The BLM is not requiring nor proposing Mr. Blincoe to construct or maintain any new range improvements on the Valley View Allotment under this decision. The BLM has the authority under 43 CFR 4120.3-1(c) to require a lessee to maintain and/or modify range improvements on public lands under 4130.3-2.

20. Protest:

“In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the damage of forcing confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours of notification, in most cases, it would be physically impossible to comply with that requirement.”

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. This would be required for the removal of livestock that have drifted in the exclusion area after the exclusion period is in effect.

21. Protest:

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

22. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response: San Bernardino County was mailed an EA on or around April 9, 2001. Comments on the EA were received from two San Bernardino County officials.

23. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response:

The statement in the EA inadvertently left out the word “apparent” before “trend.” This will be clarified in the Decision Record. “Apparent trend” is defined by the Society for Range Management as:

An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

24. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that increases of annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis ssp. rubens* and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species were generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above will be added to the Decision Record.

25. Protest:

“Blincoe agrees that continued grazing does not pose an “imminent threat of significant resource damage” (in fact, there is no threat of resource damage resulting from Blincoe’s proper grazing practices.) Blincoe agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions, do not constitute an emergency at this time. Continued grazing does not pose an imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

26. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of who are not responsible people. Vandalism occurs far too frequently and ranchers are constantly

maintaining range improvements because of vandalism. Because ranchers are willing to spend the time maintaining their improvements, water is available to wildlife as well as livestock.”

Response:

Maintenance of range improvements owned by BLM are the responsibility of the lessee and are a part of the grazing lease. Maintenance will still be required on range improvements within the excluded portion of the Valley View allotment during the interim period. We agree that wildlife benefits from lessee maintenance of range improvements.

FINAL DECISION

After further analysis my Final Decision is that cattle grazing will not be authorized in the area of exclusion which encompasses 5,779 acres of critical habitat for the desert tortoise. This area, depicted in green is shown on the enclosed map. My decision is based upon the enclosed decision record, and 43 CFR § 4130.3, 4130.3-3 and 4140.1(b)(1)(ii)(iii) which are described in the Authority section of this decision. These modifications on the Valley View Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If during the total exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

The total exclusion will be in effect until receipt of a biological opinion from the FWS that addresses the effects of grazing activities covered in the CDCA Plan on the Mojave population of the desert tortoise and the implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, by signing the record of decision for the NEMO bioregional plan amendment or January 31, 2002, whichever is later.

Applications received to graze during years of approved non-use on the Valley View Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

The portion of the Valley View Allotment located in the Mescal Mountain Range south of I-15 and portions of the allotment outside of desert tortoise critical habitat are not excluded from grazing.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on

the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM’s understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM’s decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire’s thrasher, Le Conte’s thrasher, spotted bats, Townsend’s big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM’s decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other

listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 5,779 acres of desert tortoise critical habitat on the Valley View Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Valley lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

43 CFR 4110.3-3 (a) “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section”.

43 CFR 4130.3..... “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b) (1) (ii)(iii).... “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(d)....“The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Needles Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Molly Brady
Needles Field Office Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures

Record of Decision
Valley View Allotment Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Needles Field Office
101 West Spikes Road
Needles, California 92363
Phone: (760)326-7000 Fax: (760)326-7099

May 15, 2001

In Reply Refer To:
4100(P)
09007
(CA.690.21)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear Mr.:

INTRODUCTION

The Horsethief Springs Allotment, #09007, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #46907, authorizes 2,424 animal unit months (AUMs) or 202 cattle year long. The allotment encompasses 158,606 acres of private, State, and BLM (public) administered lands. Within the allotment, the BLM administers 150,140 acres of public land, of which 50,965 acres are desert tortoise non-critical habitat.

This final grazing decision for the Horsethief Springs Allotment, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and set parameters for cattle use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. A timely protest of the proposed decision and comments on the EA were received on April 24, 2001, from Budd-Falen Law Offices, P.C. on your behalf. Comments received on the EA were analyzed and incorporated into the decision record which is enclosed. I have considered each

protest statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons, below.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest:

“Mr. Kemper has developed numerous water rights and other improvements on his ranch. Development of these improvements has required an extensive capital investment. The water developed on the ranch is used by both wildlife and livestock. In fact, wildlife are dependent on the waters developed by Kemper. Mr. Kemper also maintains a 25,000 gallon water tank on the ranch to be used for fighting wildfires. Over the last three years, Kemper has spent approximately \$40,000 in construction of additional improvements on the ranch.”

“BLM’s Proposed Decisions constitute a “taking” of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Kemper’s private property, private water rights and private improvements without due process and payment of just compensation.”

Response:

This decision affects public land within the exclusion area on the Horsethief Springs Allotment administered by BLM. The BLM has no jurisdiction on private land, and it is not the intent of this decision to regulate or limit the use of private property, including private property rights on private land which may be located adjacent to the area of exclusion.

Approximately 1 to 2 sections of private land are located within the Horsethief Springs Allotment, but these sections are located outside of the boundary of the seasonal exclusion. The private land which Kemper uses as base property includes properties numbered 425-001-21, 425-051-01, 425-171-37, and 425-045-04. This decision would not directly affect private ownership, but could indirectly impact grazing use of these lands if they were located within the exclusion area since this decision would preclude cattle from accessing any adjacent public land within the excluded area. In this case, however, Properties 425-001-21, 425-051-01, 425-171-37, and 425-045-04 are located near the town of Barstow, California, which is outside of the Horsethief Springs Allotment and area of seasonal exclusion.

Our records show that Ron Kemper, agent for Arrowhead Service Corporation, has applied with the Mojave Water District for the water rights associated with properties 425-001-21, 425-051-01, 425-171-37, and 425-045-04, as provided for in Rule 13 of the Mojave Water Agency’s Rules and Regulations. The BLM does not have any jurisdiction over water development or use on private, State or other federal lands and these water rights will not be directly infringed by this decision. These parcels are located near the town of Barstow, California and outside the Horsethief Springs Allotment and boundary of the seasonal exclusion. However, if Kemper has water rights for a source of water on public lands within the area of total exclusion, this decision will prevent cattle from accessing these

sources of water.

The Horsethief Springs Allotment contains 26 known range improvements, most of which were established prior to 1998. Some range improvements on public land on the Horsethief Springs Allotment were established under range improvement permits (BLM Section 4 permits). These include (#9640) Horsethief Spring Main Corral, (#9638) Dagger Corral, (#9636) Talc Corral, (#9502), (#9501) Tecopa Pass Fence, (#9500) Kingston Drift Fence, (#9432) Mesquite Mountain Fence, and (#9119) Wild Horse Spring. For this type of permit, Kemper owns the physical improvement but the location and construction of the facility are authorized by the BLM. Of these improvements, the water developments and corrals are located outside the area of seasonal exclusion. Some fences are located inside the excluded area of the allotment. Other range improvements on the Horsethief Springs Allotment were constructed and authorized under Cooperative Agreements for Range Improvements (4120-6). Maintenance responsibility for range improvements are assigned to the lessee as a term and condition of the grazing lease according to 43 Code of Federal Regulations (CFR) 4120.3-2, requiring entities holding a grazing lease to maintain range improvements to.

The purpose of the water tank mentioned in the above protest is unclear and it is currently under review.

2. Protest:

“Although Kemper currently runs 100 head of livestock on his ranch, he is building his herd toward, and the BLM permits the ranch to run, 202 head. Historically the ranch had 455 head of livestock. Most of the calves are born February through April, although some are born between late summer and early fall. Moving livestock at this critical time will result in significant weight loss, health problems, and animal deaths.”

“Forcing the permittee to move livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths.”

Response:

The BLM recognizes that this is a critical period in animal husbandry for a cow-calf operation. However, this period also coincides with crucial activities of the desert tortoise such as foraging to meet nutritional needs and reproduction requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths.

3. Protest:

“Kemper’s ranch has two full time employees. If this decision is enforced, those employees will lose their jobs.”

Response:

Under your current circumstances, it is expected the amount of labor force needed to effectively move cattle in and out of the closed areas would be moderate to low. The excluded area on the Horsethief

Springs is an area without developed water, and cattle drift into the area of seasonal exclusion is not expected to greatly differ from the current situation. The workload of Kemper's employees is not expected to decrease with this decision.

4. Protest:

"In 1999 the BLM assessed the Rangeland Health Standards on Kemper's ranch. According to the BLM findings, although the Horsethief Springs Allotment was not meeting the BLM's standards, the cause was other than livestock grazing."

Response:

Results from the rangeland health assessment indicated that the allotment was not meeting the native species standard. Unusually high concentrations of red brome (*Bromus madritensis* ssp. *rubens*), a non-native, invasive, annual grass, were found in a small area. Causes other than livestock grazing were cited as the reason for standards not being met, because prior to the assessment, livestock had not grazed the allotment for approximately three years.

5. Protest:

"Ron Kemper was simply presented with a copy of the Environmental Assessment ("EA") on or about April 9, 2001. Nowhere in the documents sent to him was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to Kemper's knowledge and belief, this document was never been issued in draft, Kemper's assumes that this is a draft EA and that he is allowed the right to comment pursuant to 40 CFR 1503.1. Kemper was only made aware of his opportunity to comment when his counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to Activists urging that they comment on the EA and support the no grazing alternative."

Response:

The process was structured to allow public participation prior to making the final grazing decision. The EA and proposed grazing decision were mailed separately, but at the same time to allow for a 15 day public review and protest period. Page four, paragraph four of the proposed decision(s) mailed to Kemper on April 9, 2001, stated that "Your protest should specify clearly and concisely why you think this proposed decision, and the underlying EA, is in error." According to 40 CFR 1503.1, public comment is a requirement after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared and 40 CFR 1503.1 is not applicable. The 15-day comment period on the EA was provided as a courtesy.

6. Protest:

"The Horsethief Springs Allotment contains no critical habitat for the desert tortoise. Based on that alone the BLM has no authority to implement this decision."

Response:

The BLM approved the Proposed Action of the EA to ensure protection of the desert tortoise and desert tortoise habitat.

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas. This authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands.

These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth.

[Emphasis added.]

7. Protest:

“Kemper’s proposed decision states its purpose to be protection and enhancement of desert tortoise critical habitat. Even if the BLM could take such drastic measures to protect critical habitat, there is no justification for limiting grazing in noncritical habitat areas.”

Response:

To ensure protection of the desert tortoise and desert tortoise habitat from adverse impacts of cattle grazing, the limiting of livestock use during certain seasons on the allotment is considered necessary by the BLM. This decision would also ensure additional protection of other BLM California sensitive wildlife species, special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species.

8. Protest:

“Kemper is authorized by the BLM to graze on the Horsethief Springs Allotment year around. There is no rational basis to limit livestock on these allotments if there is no decline and no proven adverse impact to tortoise habitat.”

Response:

This decision does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. This is also discussed in the response to #7.

9. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction

eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.”

Response:

Currently, there is no injunction against grazing in the CDCA. We have prepared an EA on these grazing decisions and are consulting with the FWS on the overall CDCA Plan.

10. Protest:

“The range condition on Kemper’s allotment is stable or upward condition. The BLM has presented no factual, monitoring, or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possess monitoring or other data to justify the reduction. The BLM has no such data in this case. Although the BLM’s 1999 Rangeland Health Assessment indicates not all standards are being met, the BLM clearly states the cause is not livestock grazing.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to *allow for* the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or *for the protection of other rangeland resources and values consistent with objectives of applicable land use plans*, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth.

[Emphasis added.]

As discussed in the response to protest point D, results from the rangeland health assessment indicated that the Horsethief Springs Allotment was not meeting the native species standard. Unusually high concentrations of red brome (*Bromus madritensis* ssp. *rubens*) which is a non-native, invasive, annual grass were found in a small area. Causes other than livestock grazing were cited as the reason for standards not being met, because prior to the assessment, livestock had not grazed the allotment for approximately three years.

11. Protest:

“The Proposed Decision and EA advocate the elimination of grazing in “noncritical habitat areas” This is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in non-critical habitat areas. These areas do not exist as a matter of law.”

Response:

The EA does not permanently eliminate grazing in the exclusion areas. The BLM does have the authority for limiting grazing in these areas pursuant to 43 CFR 4130.3-2 (see response to #11, earlier).

12. Protest:

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.”

Response:

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e., actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

As defined in the Endangered Species Act and its implementing regulations (50 CFR 17), the term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e., where grazing persists) than inside the cattle enclosure (where livestock were excluded). He also observed that tortoises located outside the cattle enclosure remained outside of their burrows all night significantly more often than tortoises located inside the enclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle enclosure than inside the enclosure.”

For the above reasons, the protestant’s statement is neither accurate with respect to direct “take” (i.e.

killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

13. Protest:

“Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Kemper’s livelihood. Even if he is able to secure the private pasture for his livestock “recommended” by the EA, he will lose the extensive capital investment in his ranches.”

Response:

Since sixty percent of the Horsethief Springs Allotment would not be excluded from livestock grazing during the seasonally excluded periods, Kemper may be able to move livestock to other areas of the allotment during the temporary closure with minimal disruption to existing operations.

14. Protest:

“Kemper’s livestock breeding program consists of livestock raised on the CDCA, not purchases from the outside. If forced to sell his livestock, he will never be able to achieve the quality of livestock he has now.”

Response:

According to BLM’s actual use records, Kemper stocked the Horsethief Springs Allotment with 51 cattle on February 12, 2000. The cattle have been adjusting to the desert environment on this portion of the CDCA since this time. Since sixty percent of the Horsethief Springs Allotment would not be excluded from livestock grazing during the seasonally excluded periods, Kemper will most likely be able to continue to operate the allotment at the current stocking level without having to sell cattle.

15. Protest:

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is not eliminating grazing in bighorn sheep habitat in this decision.

16. Protest:

“The BLM has no legal, statutory or regulatory authority to physically move any of the permittees livestock at any time considered harassment of livestock and will be reported to the local authorities.”

Response:

The BLM does indeed have the authority to physically remove a permittee’s or lessee’s livestock under certain conditions. If necessary, the BLM will comply with the following authorities if necessary. This authority is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of

Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

17. Protest:

“The BLM has no authority to force the permittee to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittee to construct any physical improvements without compliance with the federal statutes and regulations can not stand.”

Response

The BLM is not requiring nor proposing that Mr. Kemper construct any new range improvements on the Horsethief Allotment. BLM recognizes that NEPA compliance is required to prior to constructing range improvements. NEPA will be completed on those projects on other allotments listed in the EA following BLM administrative procedures.

18. Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has ample authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain the terms and conditions determined by the authorized officer to be appropriate to achieve management and resource

condition objectives of the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

- (a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing used shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]
- (b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added.]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

- (f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

- (a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

- (1) Violating special terms and conditions incorporated in permits or leases:

- (b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

- (1) Allowing livestock or other privately owned or controlled animals to graze on_or be driven across these lands:

- (ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part.
[Emphasis added.]

19. Protest:

“The BLM has failed to adequately discuss (consult, cooperate, or coordinate) any of these proposed actions with the affected permittee in violation with 43 CFR 4110.3-3(a).”

Response:

During the preparation of the EA, conversations were held with Mr. Kemper on numerous occasions to discuss issues related to the Horsethief Springs Allotment, including the proposed action.

20. Protest:

“The BLM may only require that a permittee maintain those range improvements that directly benefit his livestock operation. The BLM’s requirement that the permittee maintain a proposed improvement when those improvements will not benefit his operation is a violation of agency requirements.”

Response:

The BLM is not requiring nor proposing that Mr. Kemper construct or maintain any new range improvements on the Horsethief Springs Allotment under this decision. The BLM has the authority under 43 CFR 4120.3-1(c) to require a lessee to maintain and/or modify range improvements on public lands under 4130.3-2.

21. Protest:

“In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the damage of forcing confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours of notification, in most cases, it would be

physically impossible to comply with that requirement.”

Response

Increased planning and early, gradual movement of livestock out of the exclusion area should reduce any potential impacts to livestock and rangelands. Livestock would only be required to be moved out of the seasonal exclusion areas. This would be required for the removal of livestock that have drifted in the exclusion area after the exclusion period is in effect.

22. Protest:

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

23. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response:

San Bernardino County was mailed an EA on or around April 9, 2001. Comments on the EA were received from two San Bernardino County officials. In addition, According to the NEPA regulations at 40 CFR 1503.1, public comment is a requirement only after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared and 40 CFR 1503.1 is not applicable. The 15-day comment period was provided as a courtesy.

24. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response:

You are correct. The statement in the EA inadvertently left out the word “apparent” before “trend.” “Apparent trend” is defined by the Society for Range Management as:

An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. *A glossary of terms used in range management*, 3rd edition. Society for Range Management, Denver, CO.]

25. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis* ssp. *rubens*) and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species were generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above have been added to the Decision Record.

26. Protest:

“Kemper agrees that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is no threat of resource damage resulting from Kemper’s proper grazing practices.) Kemper agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions, while serious, do not constitute an emergency at this time. Continued grazing does not pose an imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

27. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of

who are not responsible people. Vandalism occurs far too frequently and ranchers are constantly maintaining range improvements because of vandalism.”

Response:

Maintenance of range improvements owned by the BLM are the responsibility of the lessee and are a part of the grazing permit. Maintenance of these improvements will still be required on the seasonally excluded portion of the grazing lease for the Horsethief Allotment.

28. Protest:

“Because Rancher’s are willing to spend time maintaining their improvements, water is available to wildlife as well as livestock. The BLM’s EA is flawed because it failed to recognize the harm to wildlife resulting from this decision.”

Response:

Maintenance of range improvements on the Horsethief Springs Allotment owned by BLM are the responsibility of the lessee and are a part of the grazing lease. We agree that wildlife benefits from lessee maintenance of range improvements.

29. Protest:

“On this 15,400+ acre ranch, Kemper provides 90% of the water for the benefit of wildlife and livestock. In addition, Kemper maintains a 25,000 gallon water tank for use in wildland fires. If Kemper is required to remove livestock, it would become economically impossible for him to maintain this fire protection and his other water sources. The ecosystem that has developed around these tanks over the last 100 years will perish. This ecosystem includes bighorn sheep, deer, desert foxes, badgers, various rodents and plant life.”

Response:

In this decision, Mr. Kemper is only required to keep cattle out of the seasonally excluded area. BLM is not requiring nor proposing Mr. Kemper to turn off water on public or private lands. Since sixty percent of the Horsethief Springs Allotment would not be excluded from livestock grazing during the seasonally excluded periods, the lessee of the Horsethief Springs Allotment may be able to continue to operate the allotment at the current stocking level without having to remove cattle from the allotment. Maintenance of range improvements on the Horsethief Springs Allotment is required as listed in the terms and conditions of the grazing lease.

Before the introduction and spread of invasive alien plant species, especially Mediterranean grass (*Schismus arabicus* and *S. barbatus*) and red brome (*Bromus madritensis* ssp. *rubens*), wildfires were uncommon in the Mojave and Colorado Deserts. These alien plant species are believed to have increased the frequency and extent of wildfires in these two deserts (Brooks 1998, 2000a, 2000b). This decision will help prevent further spread of invasive, non-native species located on the Horsethief Springs Allotment.

FINAL DECISION

After further analysis it is my Final Decision that cattle grazing will not be authorized on approximately 47,581 acres of the 50,965 acres of desert tortoise non-critical habitat within the Horsethief Springs Allotment. This area will be excluded to cattle grazing from March 1 to June 15 and from September 7 to November 7. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, and 43 CFR § 4130.3, 4110.3-3(a), 4140.1(b)(1)(ii)(iii), and other authorities which are described in the Authority section of this decision. These modifications on the Horsethief Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If during the seasonal exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This decisions will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert bio-regional plan amendment, or January 31, 2002, whichever shall be later.

Applications received to graze during years of approved non-use on the Horsethief Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable BO. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV), mining and other activity in the desert.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Horsethief Springs Allotment lessee may be able to move livestock to other areas of the allotment during the temporary closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of their

livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

The Horsethief Springs Allotment provides income to your ranching endeavors. Under your current circumstances, it is difficult to predict the amount of labor force needed to effectively move cattle in and out of the closed areas, but this decision is not expected to effect the current employment of your ranch.

AUTHORITY

The authority for this decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

4110.3-3 (a): "After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section."

43 CFR 4130.3: "Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part."

43 CFR 4140.1 b (ii)(iii): "Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization

including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Needles Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

Molly Brady
Needles Field Office Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Needles Field Office
101 West Spikes Road
Needles, California 92363
Phone: (760)326-7000 Fax: (760)326-7099

May 15, 2001

In Reply Refer To:
4100(P)
09009
(CA.690.21)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear Mr.:

INTRODUCTION

The Valley Wells Allotment, #9009, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #46909, authorizes 3,808 animal unit months (AUMs) year long on the BLM administered Valley Wells Allotment. The allotment encompasses 237,127 acres of private, State, and BLM lands. The BLM lands are comprised of 222,120 acres within the allotment, of which, 111,099 acres are desert tortoise critical habitat and 126,028 acres are non-critical habitat.

This final grazing decision for the Valley Wells Allotment, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA). In October 1994, the California Desert Protection Act was enacted that split administration of the Valley Wells Allotment between the BLM and U.S. National Park Service. Cattle are authorized on the Valley Wells Allotment; 82% is managed by the BLM and 18% of allotment was transferred to the National Park Service and designated as the Mojave National Preserve. The Valley View Allotment is located west of the Valley Wells Allotment, and grazing leases for both allotments are currently held by the same lessee.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA), which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotment to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. Timely protest(s) to the Proposed Decision for the Valley Wells Allotment and comments on the EA were received from the Budd-Falen Law Offices, P.C. on your behalf (Protest 1), and from Dave Thornton (Protest 2). Comments on the EA have been analyzed and responses incorporated into the enclosed decision record. I have considered the protest's statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons, below.

RESPONSE TO PROTEST STATEMENT OF REASONS

These responses mainly apply to the Valley Wells Allotment.

1. Protest:

“As stated above, Blincoe’s ranch has private land, state leased land and federal land. Most of this land is intermingled and not separately fenced. Blincoe and his predecessors have developed numerous water rights and other improvements on his ranch. Development of these improvements has required an extensive capital investment. The water developed on the ranches is used by both wildlife and livestock. The BLM proposed decision tries to limit Blincoe’s use of his private land and water rights by locating areas to be protected for the desert tortoise about his water sites. It would not be possible to fence the livestock off the areas to be protected for the desert tortoise as described in the proposed decision. Even if these fences could be built, without access to water, the rest of the range would be useless for livestock grazing.”

Response:

The decision is interim in nature. There are portions of the Valley Wells Allotment with water sources that located outside of the seasonal exclusion area. Considering this factor, BLM recognizes that this action will disrupt livestock operations on the Valley Wells Allotment.

2. Protest:

“Blincoe currently runs 395 head of mother cows on the ranch in normal precipitation years. Most of these calves are born from March 1 to June 1. Moving livestock at this critical time will result in significant weight loss, health problems, and animal deaths.”

“Forcing the permittee to move livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths.”

“Desert cows calve all year long, but the majority of the calves are born in February, March, and April when the cows are in thin flesh from the winter and calve easily. The proposed decision would have these thin, very pregnant cows along with some newborn calves gathered and loaded on trailers, hauled to shipping corral, loaded again onto trucks and unloaded at a feedlot. As part of a livestock management plan, this would be a very poor strategy”.

“It would take approximately four to six weeks to move 85% of these livestock. The remainder of the livestock would take a significantly greater amount of time to remove from the allotment.”

“Although the EA states that livestock would have to be removed within 48 hours of notification, in most cases , it would be physically impossible to comply with that requirement.”

Response:

The Bureau recognizes that is a critical period in animal husbandry for a cow-calf operation and moving cattle takes time. However, this period also coincides with crucial activities in the life cycle of the desert tortoise such as foraging to meet nutritional needs and reproduction requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths. The lessee would need to start gathering cattle early enough to complete the removal prior to the start of the exclusion period. After BLM notification,

cattle would be required to be removed when the seasonal exclusion is in effect within 48 hours.

3. Protest:

“Richard Blincoe was simply presented with a copy of the Environmental Assessment (“EA”) on or about April 9, 2001. Nowhere in the documents sent to him was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to Blincoe’s knowledge and belief, this document was never been issued in draft, Blincoe assumes that this is a draft EA and that he is allowed the right to comment pursuant to 40 CFR 1503.1. Blincoe was only made aware of his opportunity to comment when his counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to Activists urging that they comment on the EA and support the no grazing alternative.”

Response:

Mr. Blincoe was supplied a copy of the proposed decision by certified mail. Mr. Blincoe, along with other interested parties, was mailed a copy of the EA separately. The documents were mailed at the same time to allow for a concurrent 15-day public review of the EA and a 15-day protest period for the proposed decision.

According to 40 CFR 1503.1, public comment is a requirement after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared therefore, 40 CFR 1503.1 is inapplicable.

In addition, you were given the opportunity in the proposed decision to specify clearly and concisely in your protest why you think the proposed decision, and the underlying EA, is in error.

4. Protest:

“As stated above, Blincoe’s ranch has private land, state leased land and federal land. Most of this land is intermingled and not separately fenced. Blincoe and his predecessors have developed numerous water rights and other improvements on his ranch. Development of these improvements has required an extensive capital investment. The water developed on the ranches is used by both wildlife and livestock. The BLM proposed decision tries to limit Blincoe’s use of his private land and water rights by locating areas to be protected for the desert tortoise about his water sites. It would not be possible to fence the livestock off the areas to be protected for the desert tortoise as described in the Proposed Decision. Even if these fences could be built, without access to water, the rest of the range would be useless for livestock grazing.”

“The two BLM Proposed Decisions constitute a “taking” of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Blincoe’s private property, including private water rights and private improvements without due process and payment of just compensation. In this case, forcing Blincoe to eliminate livestock use on his private and leased lands and forcing him to “turn off” his water or fence his livestock off water is a “takings”. Even the federal court and administrative cases which discuss the “trespass” of livestock on BLM lands state that the BLM cannot “assume” trespass from existence of

livestock grazing on unfenced private lands. Again, the BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements with this decision.”

“The Valley Wells Allotment has no interior fences and is only partially fenced on its borders. Since all water sources are in Desert Tortoise Critical Habitat (DTCH), the only means of completely eliminating the presence of cattle in DTCH would be to remove cattle from the Valley Wells Ranch entirely from March 1 to June 15, and again from September 7 to November 7.”

Response:

This decision affects public land within the seasonal exclusion area as described in the Decision of Record on the Valley Wells Allotment administered by BLM. The BLM has no jurisdiction on private land, and it is not the intent of this decision to regulate or limit the use of private property, including private property rights on private land adjacent to the area of exclusion.

Approximately four sections of private land are located within the BLM administered Valley Wells Allotment. These areas are located outside of the boundary of the seasonal exclusion.

The BLM is not requiring that Mr. Blincoe construct any new range improvements on the Valley Wells Allotment under this decision. In addition, no modifications to existing range improvements are required or proposed under this decision.

Range improvements on public lands within the Valley Wells Allotment established under range improvement permits (BLM Section 4 permits) include: (#9430) Valley Wells Pasture Fence, (#9580) Cottonwood Corrals and Cattleguard, (#9011) Bull Springs Development, (#9009) Bull Springs Corrals, and (#9195) Shadow Mountain Corral. These improvements are located outside of the boundary of the seasonal exclusion and Blincoe, as well as his cattle, would have access to these areas during the seasonal exclusion dates.

Other range improvements on public land within the Valley Wells Allotment are authorized under BLM Cooperative Agreement for Range Improvements (Form 4120-6). These improvements lie both within and outside the area of seasonal exclusion. Blincoe would have access to all range improvements during interim period, but his cattle would be precluded from using them if they were located within the boundary of the exclusion during the seasonal closure dates. The BLM has the authority to determine the use of these range improvements under 43 CFR 4120.3-1 (c) .which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

The BLM is not requiring nor proposing Blincoe to turn off or fence off any water on private land under this decision. Our records show that Mr. Blincoe has water rights on several springs, (Deer, Groaner, China, Henry, Cane, Indian Creek, Blank Tank, and Black Tank (additional), Kessler and Cut Tank). These springs are located outside of the area of exclusion therefore are not affected by this decision.

BLM has the authority (BLM v. Holland Livestock Ranch et.al., 39 IBLA 272 (Feb. 15, 1979)) to

assume trespass on public lands based on the presence of livestock on unfenced private lands within the exclusion area during the excluded period.

5. Protest:

“Blincoe is authorized by the BLM to graze on the Valley Wells and Valley View Allotments year around. There is no rational basis to limit livestock on these allotments if there is no decline no proven adverse impact to tortoise habitat.”

“The shade issue that the EA mentions is not a problem on the Valley Wells Ranch. Creosote bush is plentiful throughout the DTCH. Cattle don’t eat creosote bush.”

Response:

The Valley Wells Allotment is within critical habitat for the desert tortoise. Until consultation of the CDCA Plan as a whole is completed and implemented, the limiting of livestock use during certain seasons on the allotment is considered necessary by the BLM. This decision would also ensure additional protection of other BLM California sensitive wildlife species, special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species.

6. Protest:

“The BLM also limits use on certain parts of Valley View Allotment simply because they are not separately fenced from another allotment. The BLM regulations prohibit this action. Because the area on the Valley View allotment is open to grazing, grazing use should occur. Again the BLM cannot “assume” trespass from the existence of livestock grazing on unfenced lands. Again, BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements with this decision.”

Response:

Although total closure of the portion of the Valley View Allotment north of the Nipton Road adjacent to the Kessler Springs Allotment was proposed in the EA and April 9, 2001 proposed decision, this decision excludes cattle grazing on 5,779 acres of BLM administered critical tortoise habitat within the Valley View Allotment.

7. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.”

Response:

Currently, there is no injunction against grazing in the CDCA. We have prepared an EA on these grazing decisions and are consulting with the FWS on the overall plan.

8. Protest:

“Range condition on Blincoe’s allotments is stable or upward condition. The BLM has presented no factual, monitoring, or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possesses monitoring or other data to justify the reduction. The BLM has no such data in this case.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

“The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands.”

9. Protest:

“The Proposed Decision and EA advocate the elimination of grazing in “noncritical habitat areas.” This is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in non critical habitat areas. These areas do not exist as a matter of law.”

Response:

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas. See 43 CFR 4130.3-2 in the above response.

10. Protest:

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.”

“The EA states, “Although trampling of tortoises and burrows is alleged in many papers, little direct evidence is cited.” I suspect that a tortoise stands a better chance of being run over by people monitoring cattle trespass than actually being stepped on by a cow.”

Response:

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e. actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in

tortoise habitat.

As defined in the Endangered Species Act, the term “take” and implementing regulations (50 CFR 17) means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e. where grazing persists) than inside the cattle exclosure (where livestock were excluded). He also observed that tortoises located outside the cattle exclosure remained outside of their burrows all night significantly more often than tortoises located inside the exclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle exclosure than inside the exclosure.”

11. Protest:

“Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Blincoe’s operations. Even if he is able to secure the private pasture for his livestock “recommended” by the EA, he will lose the extensive capital investment in his ranches.”

“I shopped around for pasture for the March 1 closure and found none available at any price, effectively eliminating this as an option.”

“The Proposed decision is economically and environmentally unsound, it will not accomplish its goals, and will most certainly regulate the operator out of business.”

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

“Blincoe’s livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell his livestock, he will never be able to achieve the quality of livestock he has now.”

“Blincoe’s ranch uses one full time employee and six part time employees. If this decision is enforced, Blincoe’s employees will be terminated.”

Response:

The BLM conducted a social and economic analysis for the EA, which contained a range of estimates of the economic impacts to the lessees. The analysis conducted in the EA was fairly comprehensive, however, details related to each ranch operation are unique values that cannot be ascertained nor can they be analyzed. Each allotment has specific financial and operations costs that are not available to the BLM for inclusion in the social and economic analysis. Consequently, not all potential costs were analyzed.

If Blincoe elects to sell off a portion of his existing herd, he would probably be restricted to the replacement heifers produced by his existing herd. The Bureau acknowledges that cattle born and raised in the Mojave Desert are better adapted to desert conditions.

The loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. As listed the Social and Economic Values section of the EA, an estimated loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties 2000.

The EA only analyzed a one-time cost to transport cattle. Each time cattle are transported the range of costs display in the EA would apply. Due to the complexities of each operation an overall estimate of costs could not be supplied.

Each ranch manager must determine how to best accommodate changes on the allotment. The amount of change on each allotment cannot be accurately estimated without detail financial information about each ranch.

Temporary non-renewable perennial grazing use has been authorized at minimal levels in the CDCA. The loss of temporary non-renewable grazing use would be difficult to analyze because it has rarely been authorized in the past.

Cattle are stressed during times of transport and they should receive extra care to reduce the chance of illness.

To prevent impacts to the tortoise during crucial times needed for foraging to meet nutritional needs and reproduction requirements, this action is considered necessary by the BLM.

12. Protest:

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

BLM is eliminating grazing in desert tortoise habitat, not bighorn sheep habitat in this decision.

13. Protest:

“The BLM has no legal, statutory or regulatory authority to physically move any of the permittees’ livestock at any time. Any attempted movement of the permittees’ livestock by any employee of the BLM or member of the public will be considered harassment of livestock and will be reported to the local authorities.” (Protest 1, page 5)

Response:

The BLM has legal authority to physically remove a permittee’s or lessee’s livestock under certain conditions. If necessary, the BLM will comply with the following authorities if necessary.

This authority is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

14. Protest:

“The BLM has no authority to force the permittee to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittee to construct any physical improvements without compliance with the federal statutes and regulations can not stand.” (Protest 1, page M)

Response:

The BLM is not requiring Mr. Blincoe to construct any new range improvements on the Valley View Allotment under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements. NEPA will be completed for those projects on other allotments listed in the EA following BLM administrative procedures.

15. Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not

occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

(a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]

(b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added.]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part.
[Emphasis added.]

16. Protest:

“The BLM has failed to adequately discuss (consult, cooperate, or coordinate) any of these proposed actions with the affected permittee in violation with 43 CFR 4110.3-3(a).” (Protest 1, page 5)

Response:

During the preparation of the EA, a conversation with Clay Overson, Blincoe’s ranch manager was held in April of 2001, however Blincoe’s ranch manager is in the process of moving from the area. Since BLM was informed in 2000 that the allotment was being transferred to Dave Thornton, several meetings and conversations occurred discussing impacts of the action with Mr. Thornton during April

and May. A conversation with Blincoe was held in April regarding the pending lease transfer to Dave Thornton.

17. Protest:

“The BLM may only require that a permittee maintain those range improvements that directly benefit his livestock operation. The BLM’s requirement that the permittee maintain a proposed improvement when those improvements will not benefit his operation is a violation of agency requirements.” (Protest 1, page 5)

Response:

The BLM is not requiring Mr. Blincoe to construct or maintain any new range improvements on the Valley View Allotment under this decision. The BLM has the authority under 43 CFR 4120.3-1(c) to require a lessee “to maintain and/or modify range improvements on public lands under 4130.3-2.”

18. Protest:

“In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the damage of forcing confinement and removal of these livestock.”

“Gathering and moving cattle on and off the range twice per year means pickup trucks and trailers hauling horses and cattle from remote corrals into the shipping corral and then reversing this procedure to relocate the cattle. This along with the BLM and other monitoring vehicles will create quite a fuss in the desert. These activities will result in more erosion from increased dirt road use, and increased dust that will hurt the habitat.”

“Hauling cattle and feeding them forage produced on irrigated farms causes an unnecessary dependence on fossil fuels, pumped water, etc., creating concerns about pollution and taxing our environment.”

“The EA failed to mention the benefits of grazing grasses. It is well documented around the world that grazing annual and perennial grasses enhances them, whether the grasses are grazed by livestock, wildlife, or a lawnmower. Grazing annuals causes them to tiller regrow, producing more forage and remaining green and succulent longer. Not grazing them causes them to ripen and dry up sooner, depriving all grazers, including desert tortoises, this prolonged grazing season. Grazing perennials removes the tall dry matter on top, allowing sunlight into the plant. It also promotes green up closer to the ground where smaller animals can take advantage of them.”

“The Valley Wells Ranch is located on a big hill and is bordered by approximately 27 miles of Interstate 15. Car and truck fires occur frequently as engines burn going uphill and brakes burn going down. The elimination of grazing annual grasses during the spring closure will result in a fire hazard lasting through the summer. The combination of a fire source and ungrazed annuals all summer long on a hill near Baker, California is a sure bet for unnatural wildfires that will have a negative effect on the effort to

preserve the tortoises, other animals and their habitats.”

Response:

The EA contained a range of estimates of the cumulative impacts to the affected environment, and did not analyze all of the above mentioned items. The BLM recognizes that this action may contribute cumulative impacts to the environment but the Valley Wells Allotment is within critical habitat for the desert tortoise. To prevent impacts to the tortoise during crucial times needed for foraging to meet nutritional needs and reproduction requirements, this action is considered necessary by the BLM.

The decision would avoid cumulative impacts to desert tortoise critical habitat from ongoing grazing activities. The potential for soil and vegetation disturbance, trampling of burrows, direct mortality, and injury to smaller animals such as juvenile tortoises, lizards, snakes and various insects would be reduced. Vigor and cover of plant species, especially cattle forage species, would increase. There would be a slight improvement in soil structure, reduction of impacts to cryptogamic crusts, and a reduction in the spread of exotic plants.

Before the introduction and spread of invasive alien plant species, especially Mediterranean grass (*Schismus arabicus* and *S. barbatus*) and red brome (*Bromus madritensis* ssp. *rubens*), wildfires were uncommon in the Mojave and Colorado Deserts. These alien plant species are believed to have increased the frequency and extent of wildfires in these two deserts (Brooks 1998, 2000a, 2000b). While livestock grazing may reduce the biomass of these two species, it is unclear whether this reduction would be sufficient to noticeably reduce the threat of fire, at least at moderate levels of grazing. Additionally, livestock grazing, through consumption of desirable native species and soil alteration, may promote the further establishment of these invasive alien species.

It is debatable that Mojave and Colorado Desert plant species benefit from grazing. These species did not coevolve with large ungulates and (Belsky et al. 1993) has questioned the entire notion of overcompensation of growth by plants in response to grazing pressure.

It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The EA, however, makes it clear that not much change is expected during the relatively short time frame during which this decision will be in effect.

The decision would avoid cumulative impacts to desert tortoise critical habitat from ongoing grazing activities. The potential for soil and vegetation disturbance, trampling of burrows, direct mortality, and injury to smaller animals such as juvenile tortoises, lizards, snakes and various insects would be reduced. Vigor and cover of plant species, especially cattle forage species, would increase. There would be a slight improvement in soil structure, reduction of impacts to cryptogamic crusts, and a reduction in the spread of exotic plants.

Most of Shadow Valley is within critical habitat for the desert tortoise. To ensure protection of the desert tortoise and critical desert tortoise habitat from adverse impacts of cattle grazing, the limiting of

livestock use during certain seasons on the allotment is considered necessary by the BLM. This decision would also ensure additional protection of other BLM California sensitive wildlife species, special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species.

19. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response:

San Bernardino County was mailed an EA on or around April 9, 2001. Comments on the EA were received from two San Bernardino County officials.

20. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response:

You are correct. The statement in the EA inadvertently left out the word “apparent” before “trend.” This will be clarified in the Decision Record. “Apparent trend” is defined by the Society for Range Management as:

An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

21. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that increases of annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis ssp. rubens* and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of

these species were generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above will be added to the Decision Record.

22. Protest:

“Blincoe agrees that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is no threat of resource damage resulting from Blincoe’s proper grazing practices.) Blincoe agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

“It has been documented that cattle and tortoise diets overlap. The EA doesn’t say that this overlap is a negative impact on either species except maybe in low rainfall years. This is not a low rainfall year.”

Response:

The BLM agrees that implementation of the decision is not emergency based. The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions, do not constitute an emergency at this time. Continued grazing does not pose an imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

23. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of who are not responsible people. Vandalism occurs far too frequently and ranchers are constantly maintaining range improvements because of vandalism. Because ranchers are willing to spend the time maintaining their improvements, water is available to wildlife as well as livestock.”

Response:

Maintenance of range improvements owned by BLM are the responsibility of the lessee and are a part of the grazing lease. Maintenance will still be required on range improvements within the excluded portion of the Valley View allotment during the interim period. We agree that wildlife benefits from lessee maintenance of range improvements.

FINAL DECISION

After further analysis it is my Final Decision that cattle grazing will not be authorized on 88,879 acres of the of desert tortoise critical habitat within the Valley Wells Allotment. This area will be excluded to cattle grazing from March 1 to June 15 and from September 7 to November 7. This area, depicted in green is shown on the enclosed map. Grazing use on the Valley Wells Allotment shall not exceed 1,692 animal (cattle) days for the year. My decision is based upon the enclosed decision record, and

43 CFR § 4130.3, 4110.3-3(a), 4140.1(b)(1)(ii)(iii), and other authorities, which are described in the Authority section of this decision. This decision shall modify the way your livestock use the Valley Well Allotment to protect the desert tortoise and its habitat and enhance forage conditions. It further establishes the period for this modification and sets parameters for livestock use. Grazing use on the Valley Wells Allotment shall not exceed 51,433 animal (cattle) days for the year. The permitted use for this allotment shall be temporarily reduced to 1,692 AUMs. Modifications on the Valley Wells Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If during the seasonal exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment, or January 31, 2002, whichever shall be later. The Valley Wells Allotment lies within the NEMO planning area.

Applications received to graze during years of approved non-use on the Valley Wells Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose

to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment, or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 88,879 acres of desert tortoise critical habitat on the Valley Wells Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and

later replacing the livestock after the time period of the exclusion ends.

The Valley Wells Allotment provides income to one of many of your ranching endeavors. Under your current circumstances, it is difficult to predict the amount of labor force needed to effectively move cattle in and out of the closed areas. This decision is not expected to effect the current employment of your ranch.

AUTHORITY

The authority for this decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-3 (a) “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section”.

43 CFR 4130.3 “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 b (ii)(iii) “Persons performing the following prohibited acts related to

rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(d)“The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Needle Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

Molly Brady
Needles Field Office Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Record of Decision
Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Needles Field Office
101 West Spikes Road
Needles, California 92363
Phone: (760)326-7000 Fax: (760)326-7099
email: ca690@ca.blm.gov

May 15, 2001

In Reply Refer To:
4100(P)
09076
(CA.690.21)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear :

INTRODUCTION

The Lazy Daisy Allotment, #9076, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #46976, authorizes 266 cattle year long, or 3,192 animal unit months (AUMs) on the Lazy Daisy Allotment. The allotment encompasses 332,886 acres, including private, State lands, and BLM (public) lands. Public land administered by the BLM totals 325,686 acres. Of this BLM administered land, there are 260,025 acres of desert tortoise critical habitat and 72,861 acres of non-critical habitat within the Lazy Daisy Allotment.

This final grazing decision for the Lazy Daisy Allotment, based upon the enclosed decision record, modifies the way cattle can use the allotment to protect desert tortoise and its critical habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. A timely protest of the Proposed Decision for the Lazy Daisy Allotment and comments on the EA were received from the Budd-Falen Law Offices, P.C. on your behalf. Comments on the EA have been analyzed and responses incorporated into the enclosed decision record. I have

considered each protest statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons, below.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest:

“Although the ranch historically ran 300 head of livestock, Blairs currently run 100 head of mother cows on the ranch. Most of these calves are born between February through June or July. Moving livestock at this critical time will result in significant weight loss, health problems, and animal deaths.”

“Forcing the permittee to move livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths.”

Response

The Bureau recognizes that this is a critical period in animal husbandry for a cow-calf operation. However, this period also coincides with crucial activities of the desert tortoise such as foraging to meet nutritional needs and reproduction requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths.

2. Protest:

“Blair’s ranch is managed by Milton Blair (the permittees’ father), and the permittees. If this decision is enforced, Blairs will loose the ranch and Milton Blair will no longer be able to make a living. This ranching operation is Milton Blair’s livelihood and implementing the decision will destroy it.”

Response:

The decision is interim in nature. There are portions of the Lazy Daisy Allotment which lie outside of the area where cattle grazing will be seasonally excluded (shown outside of the area depicted in green on the enclosed map) where ranching operations may be continued. Grazing use on the Lazy Daisy Allotment is currently taking place under the 1,300 animal (cattle) day limit. Even considering these factors, BLM recognizes that this action will disrupt livestock operations on the Lazy Daisy Allotment.

3. Protest:

“Mike and Mark Blair were simply presented with a copy of the Environmental Assessment (“EA”) on or about April 9, 2001. Nowhere in the documents sent to them was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to the Blairs’ knowledge and belief, this document was never been issued in draft, the Blairs assume that this is a draft EA and that they are allowed the right to comment pursuant to 40 CFR 1503.1. The Blairs were only made aware of their opportunity to comment when their counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to Activists urging that they comment on the EA and support the no grazing alternative.”

Response:

The process was structured to allow public participation prior to making the final grazing decision. The EA and proposed grazing decision were mailed separately, but at the same time to allow for a 15 day public review and protest period. According to 40 CFR 1503.1, public comment is a requirement after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared and 40 CFR 1503.1 is not applicable. The 15-day comment period was provided as a courtesy.

In addition, you were given the opportunity as described in the proposed decision that your protest should specify clearly and concisely why you think the proposed decision, and the underlying EA, is in error.

4. Protest:

“BLM’s Proposed Decisions constitute a “taking” of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Blair’s private property, private water rights and private improvements without due process and payment of just compensation. In this case, forcing Blairs to eliminate livestock use of their private land and leased lands and forcing them to “turn off” their water or fence their livestock off water is a “takings.” Even the federal court and administrative cases which discuss the “trespass” of livestock on BLM lands state that the BLM cannot “assume” trespass from existence of livestock grazing on unfenced private lands. Again, the BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements with this decision.”

Response:

This decision affects public land within the exclusion area as described in the Decision of Record on the Lazy Daisy Allotment administered by BLM. The BLM has no jurisdiction on private land, and it is not the intent of this decision to regulate or limit the use of private property, including private property rights on private land adjacent to the area of exclusion.

Approximately 28 sections of private land lie outside of the area of seasonal exclusion on the Lazy Daisy Allotment. Approximately 13 sections lie within the seasonally excluded area. The Blairs own 41 acres of private land and lease 37,567 acres of State land that is base property for the Lazy Daisy Allotment. These areas (acres) were not intended to be part of the exclusion area. This decision would not directly affect private ownership, but could indirectly impact grazing use of these lands if they were located within the seasonal exclusion area since this decision would preclude cattle from accessing any adjacent public land within the excluded area. However, the Blairs could continue to use their private lands if they choose to fence the private lands from the public lands.

The BLM is not requiring the Blairs to turn off or fence off any water on private land under this decision. The BLM does not have any jurisdiction over water development or use on private, State or other federal lands, and these water rights will not be directly infringed by this decision. However, if the Blairs have water rights for a source of water on public lands within the area of seasonal exclusion, this decision will prevent cattle from accessing these developed sources of water. Several water sources on

the allotment lie outside of the area of seasonal exclusion and will remain available for livestock use under this decision.

If the Blairs owned any range improvements on the allotment, they would still have full access to them. BLM records show there are no range improvements on public lands within the Lazy Daisy Allotment established under a range improvement permit (also called Section 4 permits, Form 4120-7). For this type of permit, the lessee would own the physical improvement but the location and construction of the facility are authorized by the BLM. The range improvements on the Lazy Daisy Allotment are authorized under BLM Cooperative Agreement for Range Improvements (Form 4120-6). No modifications or construction of new range improvements are required or proposed on the Lazy Daisy Allotment under this decision.

BLM has the authority to determine the use of range improvements under 43 CFR 4120.3-1(c), which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

BLM has the authority (BLM v. Holland Livestock Ranch et.al., 39 IBLA 272 (Feb. 15, 1979)) to assume trespass on public lands based on the presence of livestock on unfenced private lands within the exclusion area during the excluded period.

5. Protest:

“Blairs are authorized by the BLM to graze on the Lazy Daisy Allotment year around. There is no rational basis to limit livestock on these allotments if there is no decline and no proven adverse impact to tortoise habitat.”

Response:

The Lazy Daisy Allotment contains critical habitat for the desert tortoise. To ensure protection of the desert tortoise and critical desert tortoise habitat from adverse impacts of cattle grazing, the limiting of livestock use during certain seasons on the allotment is considered necessary by the BLM.

6. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.”

Response:

Currently, there is no injunction against grazing in the CDCA. We have prepared an EA on these grazing decisions and are consulting with the FWS on the overall CDCA Plan.

7. Protest:

“The range condition on Blairs’ allotments is stable or upward condition. The BLM has presented no factual, monitoring, or other evidence to show that the condition on the allotment requires this

adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possess monitoring or other data to justify the reduction. The BLM has no such data in this case.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth.
[Emphasis added.]

8. Protest:

“The EA advocates the elimination of grazing in “noncritical habitat areas.” This is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in noncritical habitat areas. These areas do not exist as a matter of law.”

Response:

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas. See 43 CFR 4130.3-2 in the above response.

9. Protest:

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.”

Response:

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e. actual killing or injuring of tortoises by trampling) would be documented if

there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

As defined in the Endangered Species Act and its implementing regulations (50 CFR 17) As defined in the Endangered Species Act, the term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e. where grazing persists) than inside the cattle enclosure (where livestock were excluded). He also observed that tortoises located outside the cattle enclosure remained outside of their burrows all night significantly more often than tortoises located inside the enclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle enclosure than inside the enclosure.”

For the above reasons, the protestants’ statement is neither accurate with respect to direct “take” (i.e. killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

10. Protest:

Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect the Blairs’ operations. Even if they are able to secure the private pasture for his livestock “recommended” by the EA, they will lose the extensive capital investment in their ranches.”

Response:

The BLM anticipates that these interim actions may result in a disruption to the livestock operations for the allotment. These disruptions have been minimized to the extent possible while still providing the necessary interim protection for the desert tortoise pending FWS consultation.

11. Protest:

“Blairs’ livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell their livestock, they will never be able to achieve the quality of livestock they have now.”

Response:

Comment noted. If a lessee sells livestock, replacement heifers and livestock purchased from adjacent ranches may be available to replace the portion of livestock that was sold. The BLM acknowledges that cattle born and raised in the CDCA are better adapted to desert conditions.

12. Protest:

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is not eliminating grazing in bighorn sheep habitat in this decision.

13. Protest:

“The BLM has no legal, statutory or regulatory authority to physically move any of the permittees livestock at any time considered harassment of livestock and will be reported to the local authorities.”

Response:

The BLM does have the authority to physically remove a permittee’s or lessee’s livestock under certain conditions. If necessary, the BLM will comply with the following authorities if necessary. This authority is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

14. Protest:

“The BLM has no authority to force the permittee to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittee to construct any physical improvements without compliance with the federal statutes and regulations cannot stand.”

Response:

The BLM is not requiring the Blairs to construct any new range improvements on the Lazy Daisy Allotment under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements. NEPA will be completed for those projects on other allotments listed in the EA following BLM administrative procedures.

15. Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain the terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives of the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

(a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing used shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]

(b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added.]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth.
[Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part.
[Emphasis added.]

16. Protest:

“The BLM has failed to adequately discuss (consult, cooperate, or coordinate) any of these proposed actions with the affected permittee in violation with 43 CFR 4110.3-3(a).”

Response:

During the preparation of the EA, a conversation on the subject was held with Mike Blair in April of 2001.

17. Protest:

“The BLM may only require that a permittee maintain those range improvements that directly benefit his livestock operation. The BLM’s requirement that the permittee maintain a proposed improvement when those improvements will not benefit his operation is a violation of agency requirements.”

Response:

The BLM is not requiring nor proposing that the Blairs construct or maintain any new range improvements on the Lazy Daisy Allotment under this decision. The BLM has the authority under 43 CFR 4120.3-1(c) to require a lessee to maintain and/or modify range improvements on public lands under 4130.3-2.

18. Protest:

“Livestock removal from this allotment would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the damage of forcing confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours of notification, in most cases, it would be physically impossible to comply with that requirement.”

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. This would be required for the removal of livestock that have drifted in the exclusion area after the exclusion period is in effect.

19. Protest:

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

20. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response:

San Bernardino County was mailed an EA on or around April 9, 2001. Comments on the EA were received from two San Bernardino County officials. In addition, according to the NEPA regulations at 40 CFR 1503.1, public comment is a requirement only after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared and 40 CFR 1503.1 is not applicable. The 15-day comment period was provided as a courtesy.

21. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response:

The statement in the EA inadvertently left out the word “apparent” before “trend.” “Apparent trend” is defined by the Society for Range Management as:

An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

22. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that increases of annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis* ssp. *rubens* and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species were generally highest in washlets, under creosote bushes, and unprotected areas.

Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above have been added to the Decision Record.

23. Protest:

“Blairs agrees that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is no threat of resource damage resulting from Blairs’ proper grazing practices). Blair agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions, while serious, do not constitute an emergency at this time. Continued grazing does not pose an “imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

24. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of who are not responsible people. Vandalism occurs far too frequently and ranchers are constantly maintaining range improvements because of vandalism.”

Response:

Because these actions are interim, and few if any range improvements exist in the exclusion areas, BLM anticipates that levels of vandalism will remain approximately the same. Maintenance of range improvements owned by BLM are the responsibility of the lessee and are a part of the grazing lease. Maintenance will still be required on range improvements within the Lazy Daisy Allotment during the interim period.

25. Protest:

“Because ranchers are willing to spend time maintaining their improvements, water is available to wildlife as well as livestock.”

Response:

We agree that wildlife benefits from lessee maintenance of range improvements.

FINAL DECISION

After further analysis it is my Final Decision that cattle grazing will not be authorized in the area of exclusion, which encompasses 108,020 acres of the 260,025 acres critical habitat for the desert

tortoise. This area, depicted in green, is shown on the enclosed map. This area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Lazy Daisy Allotment shall not exceed 1,300 animal (cattle) days for the year. My decision is based upon the enclosed decision record, 43 CFR § 4130.3, 4110.3-3(a) and 4140.1(b)(ii)(iii), and other authorities, which are described in the Authority section of this decision. These modifications on the Lazy Daisy Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If, during the total exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see Authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This Final Grazing Decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) bio-regional plan amendment or January 31, 2002, whichever shall be later.

Applications received to graze during years of approved non-use on the Lazy Daisy Allotment Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

In the Lazy Daisy Allotment, grazing use of available temporary non-renewable perennial forage shall not occur. My authority to modify current grazing practices and reduce permitted use is contained in 43 CFR 4110.3-2 (b) and 4130.3-3 (a).

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) bio-regional plan amendment or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle, mining and other activity in the desert. The decision will result in the seasonal removal of livestock grazing from 108, 020 acres of critical desert tortoise habitat on the Lazy Daisy Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Lazy Daisy lessee may be able to move livestock to other areas of the allotment during the temporary closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of their livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

The lessee is a small family operation which depends on sources of income other than ranching, but some family members depend on the ranching income entirely. A minor reduction may result in number of ranch related jobs available during the temporary closure. There will continue to be a need for employment to implement the seasonal closure. The decision will not have a significant effect on this employment.

AUTHORITY

The authority for this decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

4110.3-3 (a): "After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section."

43 CFR 4130.3: "Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource

condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(d): “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Needles Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Molly Brady
Needles Field Office Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures

Record of Decision
Lazy Daisy Allotment Map



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/barstow



May 15, 2001

IN REPLY REFER TO:

4160(P)
CA-680.36

**CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED**

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

In a letter to you dated December 21, 2000, I informed you that your livestock are continuously drifting off the Rattlesnake Canyon Allotment, #08003, onto adjacent public lands where they are not authorized to graze. Also in my letter I informed you that BLM was preparing to construct an allotment boundary fence in the southeastern portion of the allotment to eliminate this livestock drift in areas where cattle are not authorized to graze. Your cattle with your brand have been documented on numerous occasions, between March 1997 and April 2000, grazing within the Bighorn Mountain Wilderness, east of the allotment boundary, or on other public lands outside the allotment. Cattle are not authorized to graze this portion of the wilderness, or other public lands outside the allotment. Therefore, your cattle are in trespass as per 43 CFR 4140.1(b) which states, in pertinent part:

Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(iii) In an area or at a time different from that authorized.

In addition, BLM has located and identified populations of Parish's daisy (*Erigeron parishii*), listed as a threatened species pursuant to the Endangered Species Act of 1973, as amended. BLM has determined that livestock grazing may adversely affect the continued existence of this species and is currently engaged in formal consultation with the U.S. Fish and Wildlife Service (FWS) concerning the effects of the adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, including its provisions for livestock grazing, on Parish's daisy and other threatened and endangered species. In addition, BLM is requesting a letter of concurrence from FWS agreeing with BLM's assessment that construction of the fence itself will positively affect the species.

BACKGROUND

On August 24, 1994, Parish's daisy was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the CDCA Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under the CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received Biological Opinions on selected activities, including grazing (though none of these Biological Opinions addressed the effects of livestock grazing on Parish's daisy), consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective. One of the terms of that stipulation requires the construction of the fence that is the focus of this final decision.

In past conversations you recognized the need to stop this cattle drift, and presently there is no physical barrier preventing cattle drift from continuing. The continuous drift of cattle into wilderness is unacceptable, and in conflict with the California Desert Protection Act of 1994, the California Desert Conservation Area Plan, as amended, and the grazing regulations, specifically 43 CFR 4140.1(b)(1)(iii) (previously cited). The construction of this boundary fence has been determined to be consistent with the Endangered Species Act for the immediate protection of Parish's daisy. A known population of Parish's daisy will be protected through the construction of this fence. Due to steep terrain and the need to exclude livestock from Parish's daisy habitat, the fence alignment has been selected that will reduce available rangelands within this allotment by approximately 900 acres, or three percent of the allotment acreage. As a result of this realignment of the Rattlesnake Canyon Allotment boundary, the permitted use for this allotment will have be reduced by 32 AUMs. The authority to adjust grazing use based on this change is contained in 43 CFR 4110.4-2(a)(1), which states, "Where there is a decrease in public land acreage available for livestock grazing within an allotment: Grazing permits or leases may be cancelled or modified as appropriate to reflect the changed area of use."

On April 17, 2001, you received my Notice of Proposed Decision regarding the construction of the Southeast Rattlesnake Boundary Fence on the Rattlesnake Canyon Allotment.

A timely protest of the proposed decision was received on April 27, 2001, from Budd-Falen Law Offices, P.C., on your behalf. I have carefully considered each protest statement of reasons as to why the proposed decision was in error and have responded to these reasons.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest: "According to the proposed decision, the BLM is currently engaged with the U.S. Fish and Wildlife Service ("FWS") in a section 7 consultation process regarding the Parish's daisy under the Endangered Species Act. Mitchell has not been informed of the existence of the section 7 consultation nor has he been invited to participate in that process as an applicant. Mitchell clearly qualifies as an applicant and should be intricately involved in that process, including given the opportunity to appeal the BLM's biological evaluation. See Blake v. BLM, 1451 IBLA 154 (1998). The BLM's proposed decision cannot be implemented until this process has been completed.

Response: BLM has initiated formal Section 7 consultation with the FWS concerning the effects of the adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, including its provisions for livestock grazing, on Parish's daisy and other threatened and endangered species. In addition, BLM is requesting a letter of concurrence from FWS agreeing with BLM's assessment that construction of the fence itself will positively affect the species.

By letter dated March 16, 2001, you requested applicant status on BLM's ongoing ESA consultation on the CDCA Plan. The BLM State Director, in a letter dated March 30, 2001, determined that you do not meet the definition of applicant with respect to the CDCA Plan consultation. The regulations for implementing section 7 of the ESA (50 CFR 402.2) define "applicant" as a person who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action. The "action" in the subject consultation is the continued implementation of the CDCA Plan. With respect to programmatic ESA consultations, such as that on the CDCA Plan, the Section 7 consultation handbook (U.S. Fish and Wildlife Service, 1998, Endangered

Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences, 177 pp. + appendices) states: “Users of public resources (e.g. timber companies harvesting on National Forests) *are not* parties to programmatic section 7 consultations dealing with an agency’s overall management operations, *including land management planning* and other program level consultations.” (Emphasis added.) We disagree with your conclusion that the decision cannot be implemented before you have had a chance to appeal the biological evaluation.

2. Protest: “The BLM should not be allowed to reduce the amount of grazing on the allotment. The BLM has not offered adequate justification for this reduction. The fence should be constructed on the boundary line, not simply where it is most convenient to the BLM.”

Response: The authorized officer has the authority to select the fence alignment that is most consistent with the multiple-use management for that area. This authority is contained under 43 CFR 4120.3-1(a) which states, “Range improvements shall be installed, used, maintained, and/or modified on the public lands, in a manner consistent with multiple-use management.” The authorized officer may adjust allotment boundaries pursuant to 43 CFR 4110.2-4.

The loss of 900 acres in available forage production due to the construction of this boundary fence will require a reduction in permitted use for this allotment. Because of this reduction in carrying capacity, BLM has the authority to reduce the permitted use to reflect this change under 43 CFR 4110.4-2 (a)(1) (previously cited).

3. Protest: “The BLM may only require that a permittee maintain those range improvements that directly benefit his livestock operation. The BLM’s requirement that the permittee maintain proposed improvements when those improvements will not benefit his operation is a violation of agency requirements.”

Response: This range improvement will directly benefit your livestock operation. The construction of this fence will prevent further drift off the allotment into wilderness and other public and private lands where they are not authorized, thus greatly reducing the potential for any trespass actions to occur. It will also allow you to continue to graze livestock without adversely impacting Parish’s daisy. Without the fence it would likely be necessary to exclude livestock grazing from a much larger portion of the existing allotment.

The authorized officer has the authority to require you to perform normal maintenance on this boundary fence. BLM’s authority is contained in 43 CFR 4120.3-1(c), which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under 4120.3-2 of this title.”

4. Protest: “The construction of a fence is a ground disturbing activity that requires compliance with the National Environmental Policy Act (“NEPA”). The permittee has not been allowed to review this mandatory documentation. If NEPA compliance has not occurred, it must, prior to issuance of a final decision in this case.”

Response: An environmental assessment (EA) and a decision record on the construction of the fence was prepared prior to any construction on this boundary fence. The EA was not mailed to you, since an EA does not require public review.

On April 9, 2001, you were sent a copy of the draft EA for Temporary Modification to Livestock Grazing Use in the California Desert Conservation Area (EA Number CA-610-01-02) and provided with the opportunity to comment. That EA also discussed the boundary fence for the Rattlesnake Canyon Allotment.

5. Protest: “In addition to NEPA the BLM must comply with the Clean Water Act and the Archeological Resource Protection Act prior to fence construction. Until the mandatory documentation has been completed, this decision cannot be issued in final.”

Response: In the completed fence EA, cultural resources and other critical elements were analyzed and appropriate mitigation applied.

FINAL DECISION

After further analysis my final decision is to construct the Southeast Rattlesnake Boundary Fence as currently designed (see enclosed map). Due to steep terrain and the need to exclude livestock from Parish’s daisy habitat, the fence alignment will reduce available rangelands within this allotment by approximately 900 acres, or three percent of the allotment acreage. This boundary adjustment is authorized by 43 CFR 4110.2-4, which states, in pertinent part:

After consultation, cooperation, and coordination with the affected grazing permittees or lessees, the State having lands or responsible for managing resources within the area, and the interested public, the authorized officer may designate and adjust grazing allotment boundaries.

As a result of this realignment of the Rattlesnake Canyon Allotment boundary, your permitted use shall be reduced by 32 AUMs upon completion of the Southeast Rattlesnake Boundary Fence as authorized by 43 CFR 4110.4-2(a)(1) (previously cited). In addition, you shall have maintenance responsibility for this fence that will be specified in the cooperative agreement prepared for this range improvement. My authority for this action is contained in 43 CFR 4120.3-1(c) (previously cited). This cooperative agreement will specify each party’s responsibilities and monetary contributions for the construction and maintenance of this project. This authority is contained in 43 CFR 4120.3-2(a), which states:

The Bureau of Land Management may enter into a cooperative range improvement agreement with a person, organization, or other government entity for the installation, use, maintenance, and/or modification of permanent range improvements or rangeland developments to achieve management or resource condition objectives.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see Background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Area Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued

existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion implemented. These grazing decisions are a result of BLM’s understanding of its requirements under the ESA.

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Ridgecrest Field Office, 300 South Richmond Road, Ridgecrest, CA 93555-4436 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted. The following standards apply to any petition for a stay.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards.

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and

(4) whether the public interest favors granting the stay.

Sincerely,

/s/

Tim Read
Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures

Decision Record for Temporary Modification to Livestock Grazing Use in the California Desert Conservation
Area

Map



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/barstow



May 15, 2001

IN REPLY REFER TO:

4160(P)

CA-680.36

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Harper Lake Allotment, #08004, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046814, authorizes 600 Animal Unit Months (AUM)s of forage, equivalent to 50 head of cattle year-long on the Harper Lake Allotment. The allotment encompasses 26,314 total acres, 4,712 acres of private land, and 21,602 acres of BLM land. On the BLM administered land within the allotment, there are 16,482 acres of critical habitat for the desert tortoise and 5,120 acres of desert tortoise non-critical habitat within the allotment.

This final grazing decision, based upon the enclosed decision record, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, enhances forage conditions, establishes the period for this modification, and sets parameters for livestock use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area (CDCA) Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from Budd-Falen Law Offices, P.C. on your behalf. I have considered each protest statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest:

“As stated above, Ms. Smith’s ranch has private and federal land. Most of this land is intermingled and the private land is not separately fenced from the BLM land. Mrs. Smith have developed numerous water rights and other improvements on her ranche. Development of these improvements have required an extensive capital investment. The ranch has three wells, two located on the private land and one located on the BLM land. The BLM proposed decision tries to limit Ms. Smith’s use of her private land and water wells. When the ranch was purchased in 1989, \$57,000 of improvements were also purchased. The ranch is taxed annually for expenses such as feed and labor at approximately \$52,000.”

Response:

On record, Ms. Smith owns 40 acres of partially fenced private land that has been accepted as base property for the allotment. There are other private lands within the allotment. However, Ms. Smith has not submitted proof of control of these lands to the Bureau.

Based on information from the California State Water Resources Control Board, Ms. Smith holds no State appropriated water rights. Ms. Smith will have full access to the water located at her wells on private land and can graze, develop, or modify her private property as she sees fit. However adjacent public land within the exclusion areas during the exclusion periods shall not be authorized for grazing during the duration of this decision.

The Bureau acknowledges an extensive capital investment by Ms. Smith related to range improvements located on public land. BLM has the authority to require the lessee to maintain range improvements under 43 CFR 4120.3-1 (c), which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

2. Protest:

“Smith currently runs 50 head of mother cows on the ranch. Most of these calves are born between February through April. Moving livestock at this critical time will result in significant weight loss, health problems and animal deaths.”

Response:

The Bureau recognizes that this is a critical period in animal husbandry for a cow-calf operation. However this period also coincides with crucial activities for the desert tortoise such as foraging to meet nutritional needs and reproductive requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths.

3. Protest:

“Smith’s ranch uses seasonal employees to assist with their ranching business. If this decision is enforced, Ms. Smith will lose the ranch and those employees will be no longer be needed. Although the BLM callously comments that Smith has another job so she can afford to limit her use on the ranch, this is not a true statement. This ranching operation is Ms. Smith’s livelihood and implementing the decision will destroy it.”

Response:

Under the current circumstances, it is difficult to predict the amount of labor force needed to effectively move cattle in and out of the closed areas. The excluded area on the Harper Lake Allotment is an area without developed water on public land, and cattle drift into to the area of seasonal exclusion is not expected to greatly differ from the current situation. The workload of Smith’s employees is not expected to decrease with this decision.

4. Protest:

“Ms. Smith was simply presented with a copy of the Environmental Assessment (“EA”) on or about April 9, 2001. Nowhere in the documents sent to him was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to Smith’s knowledge and belief, this document was never been issued in draft, Smith assumes that this is a draft EA and that he is allowed the right to comment pursuant to 40 Code of Federal Regulations (CFR) 1503.1. Smith was only made aware of his opportunity to comment when his counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to Activists urging that they comment on the EA and support the no grazing alternative.”

Response:

The process was structured to allow public participation prior to making the final grazing decision. The EA and proposed grazing decision were mailed separately, but at the same time to allow for a 15 day public review and protest period. According to 40 CFR 1503.1, public comment is a requirement after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared.

In addition, you were given the opportunity in the proposed decision to specify in your protest, clearly and concisely why you think the proposed decision and the underlying EA is in error.

5. Protest:

“BLM’s Proposed Decision constitutes a “taking” of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Smith’s private property, including private water rights and private improvements without due process and payment of just compensation. In this case, forcing Smith to eliminate livestock use on their private and leased lands and forcing her to “turn off” her water or fence their livestock off water is a “takings.” Even the federal court and administrative cases which discuss the “trespass” of livestock on

BLM lands state that the BLM cannot “assume” trespass from the existence of livestock grazing on unfenced private lands. Again, the BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements.”

Response

This decision affects public land within the exclusion area as described in the Decision Record on the Harper Lake Allotment administered by BLM. The BLM has no jurisdiction over private land, and has no intention to regulate or limit the use of Ms. Smith’s private property, including private water rights. Ms. Smith can graze, develop, or modify her private property as she sees fit. However, during the exclusion periods and within the excluded areas, livestock grazing shall not be authorized on public land for the duration of this decision.

The BLM is not requiring the Ms. Smith to construct any new range improvements on the any of her allotment under this decision. The BLM is not requiring Ms. Smith to turn off or fence off any water on private land under this decision. In addition, no modifications or construction of new range improvements are proposed under this decision. If Ms. Smith wishes to propose modification or construction of new range improvements, they would be processed following normal administrative procedures, and if approved authorizations would be made under separate decisions.

BLM has the authority (BLM v. Holland Livestock Ranch et al., 39 Interior Board of Land Appeals (IBLA) 272 (Feb. 15, 1979)) to assume trespass on unfenced private land within the exclusion area during the excluded period. “Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going into the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.”

6. Protest:

“Smith is authorized by the BLM to graze on the Harper Lake Allotments year around. There is no rational basis to limit livestock grazing on this allotment if there is no decline in threaten or endangered species numbers nor any proven adverse impacts to tortoise habitat.”

Response:

The Harper Lake Allotment is within critical habitat for the desert tortoise. The BLM approved this decision to ensure protection of the desert tortoise and desert tortoise habitat from adverse impacts of cattle.

7. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor

the groups have met, nor can they meet, this burden.”

Response:

Currently, there is no injunction against grazing in the CDCA. We have prepared an EA and are consulting with the FWS.

8. Protest:

“The range condition on Ms. Smith’s allotment is in a stable or upward condition. The BLM has presented NO factual, monitoring or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possess monitoring or other data to justify the reduction. The BLM has no such data in this case.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

The rangeland health assessment conducted on the Harper Lake Allotment in 1999, indicates that the Native Species Standard is not being achieved in a portion of the exclusion area.

9. Protest:

“The EA advocates the elimination of grazing in “noncritical habitat areas.” As stated above this is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in noncritical habitat areas. These areas do not exist as a matter of law.”

Response:

The Harper Lake Allotment is comprised of both critical and non-critical habitat for the desert tortoise. The portion of her allotment that will be seasonally excluded from livestock grazing is in critical habitat. The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision.

The BLM does have the authority for limiting grazing in these areas. See 43 CFR 4130.3-2 in the above response.

10. Protest

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.”

Response:

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e. actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e. where grazing persists) than inside the cattle exclosure (where livestock were excluded). He also observed that tortoises located outside the cattle exclosure remained outside of their burrows all night significantly more often than tortoises located inside the exclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle exclosure than inside the exclosure.”

For the above reasons, the protestant’s statement is neither accurate with respect to direct “take” (i.e. killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

As defined in the Endangered Species Act, the term “take” and implementing regulations (50 CFR 17) means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

11. Protest:

“Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Smith’s livelihood. Even if they are able to secure the private pasture for their livestock “recommended” by the EA, they will lose their extensive capital investment in their ranch. In fact, the EA recognizes Smith will have to sell part of her livestock herd. If this decision is implemented, she will be put out of business.”

Response:

BLM anticipates that these interim actions may result in a disruption to the livestock operations for the allotment.

12. Protest:

“Forcing the permittees to move their livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths.”

Response:

See response to protest 2.

13. Protest

“Smiths’ livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell their livestock, they will never be able to achieve the quality of livestock they now have.”

Response:

Comment noted. If a lessee sells livestock, replacement heifers and livestock purchased from adjacent ranches may be available to replace the portion of livestock that was sold. The BLM acknowledges that cattle born and raised in the CDCA are better adapted to desert conditions.

14. Protest

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is not eliminating grazing in bighorn sheep habitat with this decision.

15. Protest:

“The BLM has NO legal, statutory or regulatory authority to physically move any of the permittees livestock at any time considered harassment of livestock and will be reported to the local authorities”.

Response:

The BLM does indeed have the authority to physically remove a permittee’s or lessee’s livestock under

certain conditions. If necessary, the BLM will comply with the following authorities if necessary. This authority is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

16. Protest

“The BLM has NO authority to force the permittees to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittees to construct any physical improvements without compliance with the federal statutes and regulations cannot stand.”

Response:

The BLM is not requiring Ms. Smith to construct any new range improvements on the Harper Lake Allotment under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements. NEPA will be completed for those projects on other allotments listed in the EA following BLM administrative procedures.

17. Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain the terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives of the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

- (a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing used shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]
- (b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

- (f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

- (a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:
 - (1) Violating special terms and conditions incorporated in permits or leases:
 - (b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part. [Emphasis added.]

18. Protest:

“The BLM has failed to adequately discuss (consult, cooperate or coordinate) any of these proposed action with the affected permittees in violation with 43 CFR 4110.3-3(a).”

Response:

During preparation of the EA, BLM contacted Ms. Smith. BLM informed Ms. Smith what actions were being analyzed in the EA that affected her allotment.

19. Protest:

“The BLM may only require that the permittee maintain those range improvements which directly benefit their livestock operation. The BLM’s requirement that the permittee maintain proposed improvements when those improvements will not benefit their operation is a violation of agency requirements.”

Response:

The BLM has the authority to require a lessee to maintain a range improvements, on public land, on their allotment. This authority is contain in 43 CFR 4120.3-1(c) which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands

under §4130.3-2 of this title.”

20. Protest:

“In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the range of forcing the confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours of notification, in most cases, it would be physically impossible to comply with that requirement.”

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. The 48 hour removal requirement refers to the removal of livestock that have drifted in the exclusion area when the exclusion period is in affect. BLM does not anticipates large numbers of livestock drifting into the exclusion areas. BLM believes that the removal of small numbers of livestock from any given exclusion area within 48 hours is a reasonable time frame.

21. Protest:

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

22. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response:

San Bernardino County was mailed an EA on or about April 19, 2001. Comments on the EA were received from two San Bernardino County officials.

23. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response:

You are correct. The statement in the EA inadvertently left out the word “apparent” before “trend.” This will be clarified in the Decision Record. “Apparent trend” is defined by the Society for Range Management as:

An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

24. Protest

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that increases of annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis ssp. rubens* and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species were generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above will be added to the Decision Record.

25. Protest:

“Ms. Smith agrees that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is no threat of resource damage resulting from Smith’s proper grazing practices.) Smith agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions do not constitute an emergency at this time. Continued grazing does not pose an imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

26. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of whom are not responsible people. Vandalism occurs far too frequently and ranchers are constantly maintaining range improvements because of vandalism.”

Response:

Because these actions are interim, and no range improvements exist on public land in the exclusion areas, BLM anticipates that levels of vandalism to remain the same. Maintenance of range improvements is assigned according to cooperative range improvement agreements and range improvement permits. Maintenance will still be required on range improvements within the excluded portion of both allotments during the interim period

27. Protest:

“Because ranchers are willing to spend the time maintaining their improvements, water is available to wildlife as well as livestock.”

Response:

Maintenance of range improvements owned by BLM are the responsibility of the lessee and are a part of the grazing lease. We agree that wildlife benefits from lessee maintenance of range improvements.

28. Protest:

“The Proposed Decision was not separately written for her allotment but simply “cut and pasted” from another decision. In fact, the Proposed Decision even references another allotment which the permittee does not own.”

Response:

While the practice of “cutting and pasting” from one similar document to another is a standard means of saving time, the incorrect reference in the proposed decision has been corrected in the final decision.

FINAL DECISION

After further analysis, it is my final decision that livestock grazing shall not be authorized in the seasonal exclusion area which encompasses 16,482 acres of critical habitat for the desert tortoise. This area,

depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record and 43 CFR 4110.3-2 (b), 4130.3, 4110.3-3 (a), and 4140.1(b) (i)(ii)(iii) which are described in the Authority section of this decision. This decision shall modify the way your livestock use the Harper Lake Allotment to protect the desert tortoise and its habitat, enhance forage conditions, establishes the period for this modification, and sets parameters for livestock use. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Harper Lake Allotment shall not exceed 17,033 animal (cattle) days for the year. The permitted use for this allotment shall be temporarily reduced to 560 AUMs, with a maximum stocking rate of 46 head of cattle. These modifications to grazing use on the Harper Lake Allotment shall be incorporated in to the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Harper Lake Allotments will be denied. No temporary non-renewable grazing permits will be issued in habitat for the desert tortoise.

The seasonal exclusion will be in effect until the receipt of a Biological Opinion from the FWS that addresses the effects of grazing activities covered in the CDCA Plan on the Mojave population of the desert tortoise and the implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or on January 31, 2002 whichever is later. The Harper Lake Allotment is not within the NEMO and NECO planning area boundaries.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall CDCA Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM-administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion is implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the effects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 16,482 acres of desert tortoise critical habitat on the Harper Lake Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Harper Lake lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this

section.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/
Tim Read
Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/barstow



May 15, 2001

IN REPLY REFER TO:
4160 (P)
CA-680.36

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Ord Mountain Allotment, #08005, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize grazing of ephemeral forage and an established perennial forage allocation. Your current permit #046804, authorizes 3,632 Animal Unit Months (AUM)s of forage, equivalent to 307 head of cattle and 4 horses year-long on the Ord Mountain Allotment. The allotment encompasses 154,848 total acres, approximately 18,660 acres of state and private land, and 136,188 acres of BLM-administered public land. On the BLM-administered public land within the allotment, there are 102,141 acres of desert tortoise critical habitat and 34,047 acres of desert tortoise non-critical habitat within the allotment.

This final grazing decision, based upon the enclosed decision record, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, enhance forage conditions, establishes the period for this modification, and sets parameters for livestock use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area (CDCA) Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under the CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotment to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from Budd-Falen Law Offices, P.C. on your behalf. I have considered each protest statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest:

“Why did BLM usurp FWS authority by stipulating, thus making its own unprecedented, de-facto findings of harm with no proof?”

Response:

The BLM is not usurping FWS’s authority. The FWS has issued several Biological Opinions related to livestock grazing in desert tortoise habitat. The interim restrictions contained in the proposed action concerning grazing should provide greater benefit to the tortoise and its habitat until BLM can consult with the FWS and FWS can issue new Biological Opinions on overall effects of the CDCA Plan. Until those overall effects are identified and the new Biological Opinions are implemented, the BLM is utilizing its authorities to conserve listed species and ensuring that no irretrievable or irreversible commitments of resources are made pursuant to Section 7(d) of the ESA.

2. Protest:

“Neither BLM’s stipulations, its proposed grazing decisions nor assertions in the EAs are supported by empirical evidence.”

Response:

BLM used the best information available for the analysis conducted in the EA. The analysis in the EA was used in the formulation of the proposed grazing decision.

3. Protest:

“Some of the highest densities of healthy tortoise populations exist within the Ord Mt. allotment, grazed over a century; and very lightly over the past 30 years under current management. This very allotment is proposed to be a tortoise DWMA and coveted by biologists as compensation for the proposed Fort Irwin expansion because it contains the greatest diversity of plant species in the CDCA; again, after all that grazing. What’s the problem?”

Response:

The population of desert tortoise that exists on the allotment are considered fairly disease free when compared to other populations. The Desert Tortoise Recovery Plan identifies the geographical area of the Ord Mountain Allotment within the Ord-Rodman DWMA. The recovery plan also recommends that livestock grazing cease on this allotment. The statement that Ord Mountain has the “greatest diversity of plant species in the CDCA,” is not supported by existing data. Finally, the problem is that BLM has not completed consultation with the FWS on the CDCA Plan as a whole.

4. Protest:

“The dispersed waters, created, enhanced and maintained by the rancher, sustain many species of native wildlife, in turn enhancing diversity. Bighorn sheep have re-populated the southern Newberry, Rodman and Ord Mountain ranges since the 1970's, currently with lambing populations. The EA totally

ignores the potential impact on wildlife from the loss of these water sources.”

Response:

BLM has no intention of restricting wildlife from any water sources. Livestock will not be using stock waters in the exclusion areas during the exclusion periods, but the stock waters will be available for wildlife use.

5. Protest: “The EA is riddled with unsubstantiated assertions, speculation and lore; lacking science.”

Response:

BLM used the best information available for conducting the analysis in the EA.

6. Protest:

“There is no evidence of conflict (particularly disease transmission) between bovines and bighorn sheep within this allotment.”

Response:

BLM is eliminating grazing in desert tortoise, not bighorn sheep habitat in this decision.

7. Protest:

“Why the emphasis on ‘non-critical’ habitat? What is the NEPA link?”

Response:

Non-critical habitat for the desert tortoise constitutes viable habitat for this listed species and is an important component to the overall recovery of the species and was analyzed in the EA. The California Statewide Tortoise Management Policy contains management goals related to non-critical, or Category III habitat in the case of this allotment. The primary management goal related to non-critical habitat states, “Minimize impacts to tortoises in Category III habitat through humane, low-level mitigation and compensation requirements.” In addition, the CDCA Plan was amended in 1993 to delineate desert tortoise management categories, with the management goal for Category III being, “Limit declines to the extent possible using mitigation measures.”

8. Protest:

“Unnecessary herding, particularly during Spring months, will likely kill some newborn calves and will create significantly more environmental damage than leaving dispersed cattle alone. Removal of cows within a 48 hour time period is impossible. The EA totally ignores the adverse impacts of the action it is mandated to assess.”

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. As for the 48 hour requirement, this refers to the removal of livestock that have drifted in the exclusion area after the exclusion period is in affect. BLM

BLM does not anticipate large numbers of livestock drifting into the exclusion areas. BLM believes that the removal of small numbers of livestock from any given exclusion area within 48 hours is a reasonable time frame.

9. Protest: “This proposed decisions major ‘disconnect’ between cause and effect is so blatant, BLM’s credibility is more jeopardized than the tortoise. Implementation of this proposed decision will only exacerbate the damage already done. Let’s put some common sense and equity back into the Bureau’s tool box and fix this mess.”

Response:

Comment noted. BLM used the best information available for the analysis conducted in the EA. These actions are interim restrictions until BLM consults with the FWS on the overall CDCA Plan and a new Biological Opinion is issued.

10. Protest:

“Mr. Fisher has developed numerous water rights and other improvements on his allotment and ranch. These improvements required extensive capital investment. These improvements required as extensive capital investment. These improvements are considered Mr. Fisher’s private property. 43 U.S.C. 315c. These allotments also contain private land owned by Mr. Fisher or leased by Mr. Fisher which are not separately fenced from the BLM managed lands.”

Response:

On record, Mr. Fisher owns or controls 5,920 acres of fenced and unfenced private land that has been accepted as base property for the allotment. In addition, Mr. Fisher holds water rights on several springs within the allotment boundary.

BLM acknowledges capital investment by Mr. Fisher related to range improvements located on public land. BLM has the authority, however, to require the lessee to modify range improvements under 43 CFR 4120.3-1 (c) which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

11. Protest:

“Mr. Fisher has been engaged exclusively in the livestock raising and ranching business since birth and has owned and/or used the private and BLM lands (Ord Mountain and Valley Well allotments) making up the Shield F Ranch since the 1970s. Raising livestock on the Shield F Ranch is Mr. Fisher’s only means to support his family. Fisher and his wife have one son and three grandsons. These grandsons are fifth generation ranch raised. Fisher’s ranching operation encompasses approximately 150,000 acres, and includes between 300 to 500 mother cows year round. Eighty percent of Fisher’s calf crop comes from the first part of February through April. Moving livestock at this critical time results in significant weight loss, health problems and animal deaths.”

Response:

The BLM recognizes that this is a critical period in animal husbandry for a cow-calf operation. However, this period also coincides with crucial activities of the desert tortoise such as foraging to meet nutritional needs and reproduction requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths.

12. Protest:

“In addition to its use for livestock grazing, the BLM and U.S. Fish and Wildlife Service (‘FWS’) have designated the Ord Mountain Ranch as a Desert Wildlife Management Area (‘DWMA’). Most of the wildlife on this ranch have directly benefitted from the permittee’s efforts. For example, due to the many water developments, all wildlife are more plentiful today than when Fisher purchased the ranch. There were no resident big horn sheep there; now they live in all three mountain ranges.

Response: BLM acknowledges Mr. Fisher’s contribution to wildlife populations through the development of waters in the allotment. The Desert Tortoise Recovery Plan identifies the geographical area of the Ord Mountain Allotment as within the Ord-Rodman DWMA. The recovery plan also recommends that livestock grazing cease on this allotment.

13. Protest

“Mr. Fisher was simply presented with a copy of the Environmental Assessment (‘EA’) on or about April 9, 2001. Nowhere in the documents sent to him was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to Fisher’s knowledge and belief, this document has never been issued in draft, Fisher assumes that this is a draft EA and that he is allowed the right to comment pursuant to 40 CFR 1503.1. Fisher was only made aware of his opportunity to comment when his counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to activists urging that they comment support the no grazing alternative.”

Response :

Mr. Fisher was supplied a copy of the proposed decision by certified mail. Mr. Fisher, along with other interested parties, was mailed a copy of the EA separately. The documents were both mailed at the same time to allow for a concurrent 15-day public review of the EA and a 15-day protest period for the proposed decision. The protest referenced 40 CFR 1503.1, which pertains to public comment requirements for environmental impact statements. For this decision, an EA was prepared, and therefore, 40 CFR 1503.1 is inapplicable.

14. Protest:

“BLM’s Proposed Decision constitutes a ‘taking’ of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Fisher’s private property, including private water rights and private improvements without due process and payment of just compensation. In this case, forcing Fisher to eliminate livestock use on his private and leased lands and forcing him to ‘turn off’ his water or fence his livestock off water is a

‘takings.’ Even the federal court and administrative cases which discuss the ‘trespass’ of livestock on BLM lands state that the BLM cannot ‘assume’ trespass from the existence of livestock grazing on unfenced private lands. Again, the BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements, 43 U.S.C. 315c, with this decision.”

Response:

This decision affects public land within the exclusion area on the Ord Mountain Allotment administered by BLM. The BLM has no jurisdiction over private land, and has no intention to regulate or limit the use of the Fisher’s private property, including private water rights. Mr. Fisher can graze, develop, or modify his private property as he sees fit. However, during the exclusion periods and within the excluded areas livestock grazing will not be authorized on public land for the duration of this decision.

The BLM is not requiring Mr. Fisher to construct any new range improvements on any of his allotment under this decision. The BLM is not requiring Mr. Fisher to turn off or fence off any water on private land under this decision. No modifications or construction of new range improvements are proposed under this decision. BLM has no intention of requiring the ‘turning off,’ or fencing of livestock off water on his private lands.

BLM has the authority (BLM v. Holland Livestock Ranch et.al, 39 IBLA 272 [Feb. 15, 1979]) to assume trespass on unfenced private within the exclusion area during the exclusion period.

15. Protest:

“Eleven years ago, Fisher sent to the BLM a request for completion of a takings implication assessment (‘TIA’) pursuant to Executive Order (‘E.O.’) 12630. To date, the BLM has never responded to this request. The BLM’s failure to comply with E.O. 12630 and its implementing regulations is arbitrary, capricious and not in accordance with law.”

Response:

BLM has been unable to locate this request for a TIA, and personal communication with Mr. Fisher indicates that the TIA was sent to the FWS in Portland, with only a copy of that request to FWS supplied to BLM.

16. Protest:

“Fisher is authorized by the BLM to graze on the Ord Mountain allotments year around. Despite his continued grazing, desert tortoise population numbers are either stable or increasing. Clearly there is no rational basis to limit livestock grazing on this allotment if there is no decline in threatened or endangered species numbers nor any proven adverse impacts to tortoise habitat.”

Response:

The exclusion area for the Ord Mountain Allotment is within critical habitat for the desert tortoise. Until consultation on the CDCA Plan as whole is concluded and the FWS’ Biological Opinion implemented, the limiting of livestock use on a portion of this allotment is considered necessary by BLM.

17. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.”

Response :

Currently, there is no injunction against grazing in the CDCA. BLM has prepared an EA on these interim grazing restrictions and is consulting with the FWS on the overall plan.

18. Protest:

“The range condition on Mr. Fisher’s allotments is in a stable or upward condition. The BLM has presented NO factual, monitoring or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possess monitoring or other data to justify the reduction. The BLM has no such data in this case.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

“The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands.”

The rangeland health assessment conducted on the Ord Mountain Allotment in 1999 indicates the Native Species Standard is not being achieved in a portion on the exclusion area, as well as other portions of the allotment. In addition, rangeland monitoring data that has been collected over the past several years indicates that these actions are indeed warranted and in some portions of the allotment conditions are not upward.

19. Protest:

“An independent range analysis conducted on this allotment found its condition to be in a high seral stage. That monitoring analysis confirms that there is no need to implement this proposed decision.”

Response:

Comment noted. BLM does not have any knowledge of this analysis or methodology used to make this determination.

20. Protest:

“The action of authorizing livestock grazing in the Mojave desert in desert tortoise habitat has already been the subject of six Biological Opinions issued by the FWS. Not one of these biological opinions

contain a determination that continued grazing would jeopardize the continued existence of the desert tortoise under the Endangered Species Act. In other words, in the opinion of the FWS, even with continued grazing use described in the BLM's biological evaluation, livestock grazing does not adversely affect the desert tortoise or its critical habitat. Although many years ago, Fisher applied to be a recognized 'applicant' in the Section 7 consultation process as allowed by FWS regulations, neither the BLM nor the FWS have allowed Fisher to adequately and lawfully participate in the ESA section 7 consultation process."

Response:

BLM agrees that the FWS has issued six 'non-jeopardy' biological opinions related to cattle grazing and desert tortoise in the CDCA. However, these Biological Opinions do not address the overall effects of the CDCA Plan on listed species. The interim restrictions contained in the decision record should provide greater benefit to the tortoise and its habitat until the BLM consults with the FWS on the overall effects of the CDCA Plan and the Biological Opinions are implemented.

21. Protest:

"In fact, the last FWS biological opinion relating to Fisher's allotment recognized the BLM's 'allegations' that Fisher was not in compliance with the utilization standard on approximately 10% of the allotment and still determined that continued grazing would not adversely affect the desert tortoise or its critical habitat."

Response:

The recent biological opinion relating to Fisher's allotment was issued 1997. The rangeland health assessment was conducted in 1999, and concluded that approximately 10% of the allotment was not achieving the Native Species standard, in which utilization is only an indicator. The term "adversely affect" does not have the same legal meaning as the term "adversely modify." Adverse modification to critical habitat has been documented on the Ord Mountain Allotment.

22. Protest:

"The BLM's allegations that Fisher exceeded the utilizations standards and is not meeting rangeland health standards on approximately 10% of his allotment are strongly disputed. Mr. Fisher can present expert testimony that this allotment is meeting rangeland health standards and that the rangeland and 'riparian' health of his allotments are in a stable or upward condition. In fact, a recent panel report regarding the proposed Ft. Irwin expansion, recommends the translocation of desert tortoises to Ord Mountain because of the pristine nature of the allotment. This pristine nature has been maintained despite continuous livestock grazing by the permittee."

Response:

Approximately 10% of the Ord Mountain Allotment is not achieving the Native Species standard and all the developed springs used for stock water have been classified by the BLM as non-functional.

The recent panel report recommended the relocation of desert tortoises to the Ord Mountain area, as

well as other areas, primarily because these areas are in close proximity to Ft. Irwin, contain tortoise habitat, and provide greater opportunity for tortoise survival than tank maneuvers on Ft. Irwin.

23. Protest:

“The EA advocates the elimination of grazing in ‘noncritical habitat areas.’ As stated above this is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in noncritical habitat areas. These areas do not exist as a matter of law.”

Response:

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. However, the BLM does have the authority for limiting grazing in these areas. See 43 CFR 4130.3-2 in the above response.

24. Protest:

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise ‘take’ by livestock grazing.”

Response:

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e. actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e. where grazing persists) than inside the cattle enclosure (where livestock were excluded). He also observed that tortoises located outside the cattle enclosure remained outside of their burrows all night significantly more often than tortoises located inside the enclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle enclosure than inside the enclosure.”

For the above reasons, the protest statement is neither accurate with respect to direct “take” (i.e. killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

As defined in the Endangered Species Act, the term “take” and implementing regulations (50 CFR 17) means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

25. Protest:

“Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Fisher’s livelihood. Even if they are able to secure the private pasture for their livestock ‘recommended’ by the EA, they will lose their extensive capital investment in their ranch. In fact, the EA recognizes Fisher will have to sell part of his livestock herd. If this decision is implemented, he will be put out of business.”

Response:

BLM acknowledges that these interim actions may result in a disruption to the livestock operations for the allotment. These disruptions have been minimized to the extent possible while still providing the necessary interim protections for the desert tortoise pending FWS consultation.

26. Protest: “Forcing the permittees to move their livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths.”

Response:

See response to protest #11.

27. Protest

“Fisher’s livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell their livestock, they will never be able to achieve the quality of livestock they now have.”

Response:

Comment noted. If a lessee sells livestock, replacement heifers and livestock purchased from adjacent ranches may be available to replace the portion of livestock that was sold. The BLM acknowledges that cattle born and raised in the CDCA are better adapted to desert conditions.

28. Protest:

“According to the California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is eliminating grazing in desert tortoise habitat, not bighorn sheep habitat in this decision.

29. Protest:

“The BLM has NO legal, statutory or regulatory authority to physically move any of the permittees livestock at any time. This would be considered harassment of livestock and will be reported to the local authorities.”

Response:

BLM’s authority regarding trespass livestock grazing is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

“Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.”

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

“After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.”

30. Protest:

“The BLM has NO authority to force the permittees to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittees to construct any physical improvements without compliance with the federal statutes and regulations cannot stand.”

Response:

The BLM is not requiring Mr. Fisher to construct any new range improvements on the Ord Mountain Allotment under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements.

31 . Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain the terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives of the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

- (a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing used shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]
- (b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added.]

43 CFR 4130.3-2 states, in part:

“The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

- (f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part. [Emphasis added.]

32. Protest:

“The BLM has failed to adequately discuss (consult, cooperate or coordinate) any of these proposed actions with the affected permittees in violation with 43 CFR 4110.3-3(a).”

Response:

The BLM Field Manager has attempted to contact the lessee several times by phone during the preparation of the EA.

33. Protest:

“The BLM may only require that the permittee maintain those range improvements which directly benefit

their livestock operation. The BLM's requirement that the permittee maintain proposed improvements when those improvements will not benefit their operation is a violation of agency requirements."

Response:

The BLM is not requiring Mr. Fisher to construct or maintain any new range improvements on the Ord Mountain Allotment under this decision. However, the BLM has the authority under 43 CFR 4120.3-1(c) to require a lessee to maintain and/or modify range improvements on public lands.

34. Protest:

"In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the range of forcing the confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours of notification, in most cases, it would be physically impossible to comply with that requirement."

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. The 48 hour removal requirement refers to the removal of livestock that have drifted in the exclusion area when the exclusion period is in effect. BLM does not anticipate large numbers of livestock drifting into the exclusion areas. BLM believes that the removal of small numbers of livestock from any given exclusion area within 48 hours is a reasonable time frame.

35. Protest:

"The economic impact of implementation of this EA on the County and local area will be significant. Although the EA 'suggests' that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business."

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

36. Protest:

"San Bernardino County was not consulted about the proposed EA in violation of NEPA."

Response:

San Bernardino County was mailed an EA on or about April 9 , 2001. Comments on the EA were received from two San Bernardino County officials.

37. Protest:

“The statement in the EA that trend can be ascertained by ‘observation of grazing intensity of the key species’ is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response

The statement in the EA inadvertently left out the word “apparent” before “trend.” This will be clarified in the Decision Record. “Apparent trend” is defined by the Society for Range Management as:

“An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

38. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that increases of annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis ssp. rubens* and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species were generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above will be added to the Decision Record.

39. Protest:

“Mr. Fisher agrees that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is no threat of resource damage resulting from Fisher’s proper grazing practices.) Fisher agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions do not constitute an emergency at this time. Continued grazing does not pose an imminent likelihood of significant resource damage to soils, wildlife habitat, vegetation, and other critical values in this allotment.

40. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of whom are not responsible people. Vandalism occurs far too frequently and ranchers are constantly maintaining range improvements because of vandalism.”

Response:

Because these actions are interim, and few, if any, range improvements exist in the exclusion areas, BLM anticipates that levels of vandalism to remain approximately the same. Maintenance of range improvements is assigned according to cooperative range improvement agreements and range improvement permits. Maintenance will still be required on range improvements within the excluded portion of both allotments during the interim period.

FINAL DECISION

After further analysis, it is my final decision that livestock grazing shall not be authorized in the seasonal exclusion area which encompasses 54,000 acres of critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record and 43 CFR 4110.3-2 (b), 4130.3, 4110.3-3(a), and 4140.1(b)(1)(ii)(iii) which is described in the Authority section of this decision. This decision shall modify the way your livestock use the Ord Mountain Allotment to protect the desert tortoise and its habitat, enhance forage conditions, establish the period for this modification, and set parameters for livestock use. This area will be excluded from livestock grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Ord Mountain Allotment shall not exceed 62,842 animal (cattle) days for the year. The permitted use for this allotment shall be temporarily reduced to 2,066 AUMs, with a maximum stocking rate of 172 animals. If domestic horses are turned out on public lands within the allotment, the equal number of cattle shall be removed. Livestock shall be prohibited from use of the developed springs if located within the exclusion area during the excluded seasons through the construction of water control fencing which shall

enclose the trough(s). These modification to grazing use on the Ord Mountain Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Ord Mountain Allotment will be denied. No temporary non-renewable grazing permits will be issued in habitat for the desert tortoise.

The construction of both riparian exclosure and water control fence shall be implemented at all developed springs located on public land within the allotment in order to improve riparian habitat conditions.

As stated in the court-approved settlement agreement, this Final Grazing Decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall CDCA Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM-administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable

and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion is implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the effects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 54,000 acres of desert tortoise critical habitat on the Ord Mountain Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Ord Mountain lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): "Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized."

43 CFR 4150.2(a): "Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3."

43 CFR 4150.2(b): "Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer."

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;

- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/
Tim Read
Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/barstow



May 15, 2001

IN REPLY REFER TO:

4160(P)

CA-680.36

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Pahrump Valley Allotment, #08000, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current permit, #046800, authorizes 353 Animal Unit Months (AUMs) of forage, equivalent to 117 head of cattle from March 1 to May 15 on the Pahrump Valley Allotment. The allotment encompasses 32,321 acres, which includes 983 acres of private land, and 31,338 acres of BLM land. There are 31,338 acres of desert tortoise non-critical habitat administered by the BLM within the allotment.

This final grazing decision, based upon the enclosed decision record, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, enhances forage conditions, establishes the period for this modification, and sets parameters for livestock use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. No protest of this decision has been received from you.

FINAL DECISION

After further analysis, my final decision is that cattle grazing will not be authorized in the seasonal exclusion area which encompasses 7,680 acres of non-critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, and 43 CFR § 4130.3, 4140.1(b)(1)(ii)(iii), 4150.2(a), 4150.2(b) and other authorities, which are described in the Authority section of this decision. These modifications on the Pahrump Valley Allotment shall be incorporated into the current grazing lease as terms and conditions as long as this decision is in effect. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. This decision does not affect the permitted use on the Pahrump Valley Allotment.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification from the BLM to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Pahrump Valley Allotment will be denied.

As stated in the court-approved settlement agreement, this Final Grazing Decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment, or January 31, 2002, whichever shall be later. The Pahrump Valley Allotment is within the NEMO planning area.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to address the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) and Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert. The decision will result in the season exclusion removal of livestock grazing from 7,680 acres of desert tortoise non-critical habitat in the Pahrump Valley Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Pahrump Valley lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented

agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have

the burden of proof to demonstrate why a stay should be granted. The following standards apply to any petition for a stay.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards.

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Tim Read
Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/barstow



May 15, 2001

IN REPLY REFER TO:
4160(P)
CA-680.36

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Rattlesnake Canyon Allotment, #08003, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046803, authorizes 1,081 animal unit months (AUMs), equivalent to 84 head of cattle and 4 horses year-long on the Rattlesnake Canyon Allotment. The allotment encompasses 28,757 acres, 1,925 acres of state and private land, and 26,832 acres of BLM land. There are 12,800 acres of non-critical habitat for the desert tortoise within the allotment.

This final grazing decision, based upon the enclosed decision record, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, enhances forage conditions, establishes the period for this modification, and sets parameters for livestock use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area (CDCA) Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from Budd-Falen Law Offices, P.C. on your behalf. I have considered each protest statement of reasons as to why you believe the proposed decision was in error and have responded to these reasons. The BLM issued a proposed

decision and Environmental Assessment (EA) which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C on your behalf. Comments on the EA have been analyzed and responses incorporated into the enclosed decision record. I have considered the protest's statement of reasons as to why you believe the proposed decision was in error and have responded to each these reasons.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest:

"As stated above, Mr. Mitchell ranch has private and federal land. Most of this land is intermingled and the private land is not separately fenced from the BLM land. Mitchell and his predecessors have developed numerous water rights and other improvements on her ranch. Development of these improvements have required an extensive capital investment. The water developed on the ranch is used by both wildlife and livestock. Mitchell paid \$140,000 for the BLM permit and all its improvements and \$25,000 for the private land when he purchased the ranch.

Response:

On record, Mr. Mitchell owns 5 acres of fenced private land that has been accepted as base property for the allotment. There are other private lands within the allotment. However, Mr. Mitchell has not submitted proof of control of these lands to the Bureau.

Based on information from the California State Water Resources Control Board, Mr. Mitchell holds a State appropriated water right on Dove Spring only. Mr. Mitchell will have total access to his private land and can graze, develop, or modify his private property as he sees fit. However, adjacent public land within the exclusion areas, during the exclusion periods shall not be authorized for grazing for the duration of this decision.

The Bureau acknowledges an extensive capital investment by the Mr. Mitchell related to range improvements located on public land. BLM has the authority to require the lessee to maintain range improvements under 43 CFR 4120.3-1 (c) .which states, "The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title."

2. Protest:

Mitchell currently runs 86 head of mother cows and 4 horses on the ranch. Most of these calves are born between February through April. Moving livestock at this critical time will result in significant weight loss, health problems and animal deaths.

Response:

The Bureau recognizes that this is a critical period in animal husbandry for a cow-calf operation. However, this period also coincides with crucial activities for the desert tortoise such as foraging to meet nutritional needs and reproductive requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal.

3. Protest:

Although the official area covered by the no-grazing stipulation is small, the decision results in non-use for the majority of the ranch. According to the decision, trailing across the ranch must stop. Although the BLM “estimates” that the rancher can use trucks to transport his livestock across the ranch, this suggestion is not possible, unless the BLM will provide extensive maintenance on what are now impassible roads.

Response:

As analyzed in the EA, the closure of Rattlesnake Canyon to the trailing of livestock will have a deleterious affect on this grazing operation. With this closure, the way Mr. Mitchell uses the allotment will change. Although the roads which would allow the trucking of livestock from one portion of the allotment to another are not well maintained, they are passable. These roads are either private, or part of the county road system and BLM lacks the nexus to maintain them.

4. Protest:

Mitchell’s ranch has one employee to assist with his ranching business. If this decision is enforced, Mitchell will lose the ranch and his employee will be no longer used. Mitchell will be bankrupted if this decision is enforced in final.

Response

The implementation of this decision will be particularly impacting to this grazing operation. With this closure of Rattlesnake Canyon to the trailing of livestock, the way Mr. Mitchell uses the allotment will change. Mr. Mitchell will still have permitted use, although reduced, to continue with a smaller grazing operation.

5. Protest:

“Mr. Mitchell was simply presented with a copy of the Environmental Assessment (“EA”) on or about April 9, 2001. Nowhere in the documents sent to him was any information requesting his comments on the EA, nor does the EA state that this was a draft. Because, to Smith’s knowledge and belief, this document was never been issued in draft, Smith assumes that this is a draft EA and that he is allowed the right to comment pursuant to 40 CFR 1503.1. Smith was only made aware of his opportunity to comment when his counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to Activists urging that they comment.”

Response:

The process was structured to allow public participation prior to making the final grazing decision. The EA and proposed grazing decision were mailed separately, but at the same time to allow for a 15 day public

review and protest period. According to 40 CFR 1503.1, public comment is a requirement after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared.

6. Protest:

The Rattlesnake Canyon Allotment contains NO critical habitat for the desert tortoise. Based upon that alone, the BLM has no authority to implement this decision.

Response

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas under 43 CFR 4130.3-2 which states, “The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands.”

7. Protest:

The Proposed Decision states its purpose to be protection and enhancement of desert tortoise critical habitat. Even if the BLM could take such drastic measures to protect critical habitat, there is no justification for limiting grazing in noncritical habitat.

Response: See response to protest #6.

8. Protest:

BLM’s Proposed Decision constitutes a “taking” of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Mitchell’s private property, including private water rights and private improvements without due process and payment of just compensation

Response:

This decision affects public land within the exclusion area as described in the Decision Record on the Rattlesnake Canyon Allotment administered by BLM. The BLM has no jurisdiction over private land, and has no intention to regulate or limit the use of the private property, including private water rights. Mr. Mitchell can graze, develop, or modify their private property as they see fit. However, during the exclusion periods and within the excluded areas livestock grazing shall not be authorized on public land for the duration of this decision.

The BLM is not requiring Mr. Mitchell to construct any new range improvements on the his allotment under this decision. The BLM is not requiring Mr. Mitchell to turn off or fence off any water on private land under this decision. In addition, no modifications or construction of new range improvements are proposed under this decision. If Mr. Mitchell wishes to propose modification or construction of new range improvements, they would be processed following normal administrative procedures, and if approved authorizations

would be made under separate decisions.

9. Protest:

The BLM decision eliminates trailing on the Rattlesnake Canyon ranch. Eliminating of trailing will destroy the ranch. It is both physically and financially impossible to truck livestock to the portion of the ranch the BLM claims is left open. The elimination of trailing results in placing the entire ranch in “non-use” and is a takings.

Response:

Unfortunately, the implementation of this decision will be particularly impacting to this grazing operation. With this closure of Rattlesnake Canyon to the trailing of livestock the way Mr. Mitchell uses the allotment will change. Mr. Mitchell will have increased operational costs related to the need to truck cattle, however this option does exist.

10. Protest:

Mitchell is authorized by the BLM to graze on the Rattlesnake Canyon Allotment year around. There is no rational basis to limit livestock grazing on this allotment if there is no decline in threaten or endangered species numbers nor any proven adverse impacts to tortoise habitat.

Response:

The BLM approved this decision to ensure additional protection of the desert tortoise and desert tortoise habitat from adverse impacts of cattle.

11. Protest:

Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.

Response

Currently, there is no injunction against grazing in the CDCA. We have prepared an EA and are consulting with the FWS.

12. Protest:

The range condition on the Mitchell’s Allotments is in a stable or upward condition. The BLM has presented NO factual, monitoring or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possess monitoring or other data to justify the reduction. The BLM has no such data in this case.

Response

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

The rangeland health assessment conducted on the Rattlesnake Canyon Allotment in 1999, indicates that the Native Species Standard is not being achieved in a portion on the exclusion area. In addition, rangeland monitoring conducted in the exclusion area over the past several years also indicates degradation of desert tortoise habitat quality.

13. Protest:

The EA advocates the elimination of grazing in “noncritical habitat areas.” As stated above this is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in noncritical habitat areas. These areas do not exist as a matter of law.

Response

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas. See 43 CFR 4130.3-2 in the above response.

14. Protest:

With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.

Response

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take

(i.e. actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e. where grazing persists) than inside the cattle exclosure (where livestock were excluded). He also observed that tortoises located outside the cattle exclosure remained outside of their burrows all night significantly more often than tortoises located inside the exclosure. He concluded: "This is consistent with the occurrence of having more damaged burrows outside the cattle exclosure than inside the exclosure."

For the above reasons, the appellants statement is neither accurate with respect to direct "take" (i.e. killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

As defined in the Endangered Species Act, the term "take" and implementing regulations (50 CFR 17) means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

15. Protest:

"Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Mitchell's livelihood and will put him out of business. Even if they are able to secure the private pasture for their livestock "recommended" by the EA, they will lose their extensive capital investment in their ranch."

Response

The Bureau does not anticipate that the actions contained in this decision will result in putting Mr. Mitchell completely out of the livestock business. However, the implementation of these actions will have a deleterious effect on his ability to maintain a viable livestock operation.

16. Protest:

"Forcing the permittees to move their livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths."

Response:

See response to protest #2.

17. Protest:

“Mitchell’s livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell their livestock, they will never be able to achieve the quality of livestock they now have.”

Response:

Comment noted. If a lessee sells livestock, replacement heifers and livestock purchased from adjacent ranches may be available to replace the portion of livestock that was sold. The BLM acknowledges that cattle born and raised in the CDCA are better adapted to desert conditions.

18. Protest:

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is eliminating grazing in desert tortoise habitat, not bighorn sheep habitat with this decision.

19. Protest:

“The BLM has NO legal, statutory or regulatory authority to physically move any of the permittees livestock at any time. Any attempted movement of the permittee’s livestock by any employee of the BLM or member of the public will be considered harassment of livestock and will be reported to the local authorities.”

Response:

The BLM does indeed have the authority to physically remove a permittee’s or lessee’s livestock under certain conditions. If necessary, the BLM will comply with the following authorities if necessary. This authority is contained in Title 43 Code of Federal Regulations (CFR) at § 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

20. Protest:

“The BLM has NO authority to force the permittees to construct fences or other improvements without compliance with the National Environmental Policy Act (“NEPA”) and other federal statutes. Any decision which purports to force the permittees to construct any physical improvements without compliance with the federal statutes and regulations cannot stand.”

Response

The BLM is not requiring Mr. Mitchell to construct any new range improvements on the Rattlesnake Canyon Allotment under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements. NEPA will be completed for those projects on other allotments listed in the EA following BLM administrative procedures.

21. Protest:

“The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations.”

Response:

The Bureau has authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition, BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain the terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives of the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

(a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing used shall not exceed the

livestock carrying capacity of the allotment. [Emphasis added.]

(b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR

4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part. [Emphasis added.]

22. Protest:

“The BLM has failed to adequately discuss (consult, cooperate or coordinate) any of these proposed action with the affected permittees in violation with 43 CFR 4110.3-3(a).”

Response

The BLM field manager has attempted to contact the lessee several times by phone during the preparation of the EA.

23. Protest:

“The BLM may only require that the permittee maintain those range improvements which directly benefit their livestock operation. The BLM’s requirement that the permittee maintain proposed improvements when those improvements will not benefit their operation is a violation of agency requirements.”

Response:

The BLM has the authority to require a lessee to maintain a range improvements, on public land, on their allotment. This authority is contain in 43 CFR 4120.3-1(c) which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

24. Protest:

“In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the range of forcing the confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours notification, in most cases, it would be physically impossible to comply with that requirement.”

Response

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. The 48 hour removal requirement refers to the removal of livestock that have drifted in the exclusion area when the exclusion period is in affect. BLM does not anticipates large numbers of livestock drifting into the exclusion areas. BLM believes that the removal of

small numbers of livestock from any given exclusion area within 48 hours is a reasonable time frame.

25. Protest:

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

26. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response

San Bernardino County was mailed an EA on or about April 9, 2001. Comment on the EA were received from two San Bernardino County offices.

27. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response

The statement in the EA inadvertently left out the word “apparent” before “trend.” This will be clarified in the Decision Record. “Apparent trend” is defined by the Society for Range Management as:

“An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

28. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion although not referenced in the document. In studies in the Western Mojave Desert, there is evidence that increases of annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis ssp. rubens* and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species were generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities has reduced cover and disturbed the soil (Brooks 2000b). It is expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annual and perennials and a concomitant decrease in the biomass of invasive species. The references cited above will be added to the Decision Record.

29. Protest:

“Mitchell agrees that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is no threat of resource damage resulting from Mitchell’s proper grazing practices.) Mitchell agrees with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions, while serious, do not constitute an emergency at this time. Continued grazing does not pose an imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

30. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of whom are not responsible people. Vandalism occurs far too frequently and ranchers are constantly maintaining range improvements because of vandalism.”

Response:

Because these actions are interim, and no range improvements exist on public land in the exclusion areas, BLM anticipates that levels of vandalism to remain the same. Maintenance of range improvements is assigned according to cooperative range improvement agreements and range improvement permits. Maintenance will still be required on range improvements within the excluded portion of both allotments during the interim period

31. Protest:

“Because ranchers are willing to spend the time maintaining their improvements, water is available to wildlife as well as livestock. The EA is flawed because it fails to recognize the significant harm to wildlife by eliminating their water sources.”

Response:

Maintenance of range improvements owned by BLM are the responsibility of the lessee and are a part of the grazing lease. We agree that wildlife benefits from lessee maintenance of range improvements.

FINAL DECISION

After further analysis, it is my final decision that livestock grazing shall not be authorized in the seasonal exclusion area which encompasses 6,600 acres of non-critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record and 43 CFR 4110.3-2 (b), 4130.3, 4110.3-3, and 4140.1(b)(1)(ii)(iii) which are described in the Authority section of this decision. This decision shall modify the way your livestock use the Rattlesnake Canyon Allotment to protect the desert tortoise and its habitat, enhance forage conditions, establish the period for this modification, and set parameters for livestock use. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. The permitted use for this allotment shall be temporarily reduced to 541 AUMs, with a maximum stocking rate of 45 animals. If domestic horses are turned out on public lands within the allotment, the equal number of cows shall be removed.

The trailing of livestock through Rattlesnake Canyon shall cease until further notice. The installation of cattleguards and gap fence shall be developed within the canyon to facilitate this action. These modifications to grazing use on the Rattlesnake Canyon Allotment shall be incorporated into the current grazing lease as terms and conditions for the duration of this decision.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Rattlesnake Canyon Allotment will be denied. No temporary non-renewable grazing permits will be issued in habitat for the desert tortoise.

The modification to other grazing use on the Rattlesnake Canyon Allotment set forth in this grazing decision will cease upon the receipt of a Biological Opinion from the FWS that addresses the effects of grazing activities covered in the CDCA Plan on the Mojave population of the desert tortoise and the implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or on January 31, 2002 whichever is later. The Rattlesnake Canyon Allotment are not within the NEMO and NECO planning area .

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall CDCA Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM-administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion is implemented. These grazing decisions are a result of BLM’s understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM’s decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire’s thrasher, Le Conte’s thrasher, spotted bats, Townsend’s big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the effects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 6,600 acres of desert tortoise non-critical habitat on the Rattlesnake Canyon Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Rattlesnake Canyon lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay

must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Tim Read
Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE
2601 BARSTOW ROAD
BARSTOW, CA 92311
(760) 252-6000
www.ca.blm.gov/barstow



May 15, 2001

IN REPLY REFER TO:
4160(P)
CA-680.36

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Cronese Lake Allotment, #08007, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046815, authorizes 500 animal unit months (AUMs), equivalent to 40 head of cattle year-long on the Cronese Lake Allotment. The allotment encompasses 65,304 total acres, of which 11,054 acres are state or privately owned land and 54,250 acres are BLM land. On BLM-administered land within the allotment there are 30,080 acres of critical habitat for the desert tortoise.

The Cady Mountain Allotment, #08006, is an ephemeral/perennial allotment with potential forage production to enable the BLM to authorize ephemeral forage and established perennial forage allocation on a temporary non-renewable basis; however, total grazing use shall not exceed 2,059 AUMs. Your current lease, #046815, authorizes 2,059 AUMs, equivalent to 172 head of cattle year-long on the Cady Mountain Allotment. The allotment encompasses 231,897 total acres, of which 71,793 acres are state or privately owned land and 160,104 acres are BLM land. On BLM-administered land within the allotment, there are 160,104 acres of non-critical habitat for the desert tortoise.

This final grazing decision, based upon the enclosed decision record, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat and enhance forage conditions, establishes the period for this modification, and sets parameters for livestock use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations with plaintiffs regarding actions to be taken to provide protection for endangered and threatened species pending the consultation on the CDCA Plan. The product of these negotiations resulted in five separate settlement agreements. Reaching agreement regarding such interim actions avoided litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a)(2) of the ESA and are avoiding making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a

15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. Comments on the EA have been analyzed and responses incorporated into the enclosed decision record. I have considered the protest's statement of reasons as to why you believe the proposed decision was in error and have responded to each these reasons, below.

RESPONSE TO PROTEST STATEMENT OF REASONS

1. Protest:

"As stated above, the Wettermans' ranches have private and federal land. Most of this land is intermingled and the private land is not separately fenced from the BLM land. Wettermans have developed numerous water rights and other improvements on their ranches. Development of these improvements has required an extensive capital investment of over \$100,000. The water developed on the ranches is used by both wildlife and livestock.. The Cady Mountain ranch is also dependent upon continued use of the Mojave River and Afton Canyon area for water. Water gaps have been developed specifically to allow livestock to use this water."

Response:

On record, the Wettermans own 49 acres of fenced private land that has been accepted as base property for both allotments. There are other private lands within both allotments. The Wettermans have not submitted proof of control of these lands to the Bureau.

Based on information from the California State Water Resources Control Board, the Wettermans hold no State appropriated water rights. Under the current Livestock Use Agreement (LUA), livestock currently have access to two water gaps in Afton Canyon. This decision will terminate the LUA. Water for livestock use will no longer be provided at Afton Canyon; however, an alternative water source at 9-Mile Spring is planned for redevelopment.

The Bureau acknowledges an extensive capital investment by the Wettermans related to range improvements located on public land. BLM has the authority to require the lessee to maintain range improvements under 43 CFR 4120.3-1(c), which states, "The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title."

2. Protest:

"The Wettermans run 100 to 200 head of mother cows on their ranches. Most of these calves are born between February through June. Moving livestock at this critical time will result in significant weight loss, health problems and animal deaths."

Response:

The Bureau recognizes that this is a critical period in animal husbandry for a cow-calf operation. However, this period also coincides with desert tortoise crucial activities such as foraging to meet nutritional needs and reproductive requirements. Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths.

3. Protest:

“The Wetterman’s have two employees to assist with their ranching business. If this decision is enforced, the Wettermans will lose their ranches and those employees will be no longer used.”

Response:

The Bureau anticipates that these interim actions will result in a minimal disruption to the livestock operations for both allotments. The exclusion areas for these allotments are portions of the allotments where livestock grazing generally does not occur, or occurs infrequently. There are no reductions in permitted use for Cady Mountain allotment, and only a slight reduction in permitted use for the Cronese Lake Allotment.

4. Protest:

“The Wettermans were simply presented with a copy of the Environmental Assessment (EA) on or about April 9, 2001. Nowhere in the documents sent to them was any information requesting their comments on the EA, nor does the EA state that this was a draft. Because, to the Wettermans’ knowledge and belief, this document was never been issued in draft, Wettermans assume that this is a draft EA and that they are allowed the right to comment pursuant to 40 Code of Federal Regulations (CFR) 1503.1. Wettermans were only made aware of their opportunity to comment when their counsel inadvertently received a copy of an e-mail from Daniel Patterson of the Center for Biodiversity to activists urging that they comment on the EA and support the no grazing alternative.”

Response:

The Wettermans were supplied a copy of the proposed decision by certified mail. The Wettermans, along with other interested parties, were mailed a copy of the EA separately. The documents were both mailed at the same time to allow for a concurrent 15-day public review of the EA and a 15-day protest period for the proposed decision. The protest referenced 40 CFR 1503.1, which pertains to public comment requirements for environmental impact statements. For this decision, an EA was prepared, and therefore, 40 CFR 1503.1 is inapplicable.

5. Protest

“BLM’s Proposed Decision constitutes a ‘taking’ of private property and private property rights in violation of the 5th Amendment of the U.S. Constitution. The BLM has no authority to regulate or limit the use of Wettermans’ private property, including private water rights and private improvements without due process and payment of just compensation. In this case, forcing Wettermans to eliminate

livestock use on their private and leased lands and forcing them to “turn off” their water or fence their livestock off water is a “takings.” Even the federal court and administrative cases which discuss the “trespass” of livestock on BLM lands state that the BLM cannot “assume” trespass from the existence of livestock grazing on unfenced private lands. Again, the BLM cannot limit the use of private lands, private water rights or Taylor Grazing Act section 4 improvements.”

Response:

This decision affects public land within the exclusion area as described in the decision record on the Cronese Lake and Cady Mountain Allotments administered by BLM. The BLM has no jurisdiction over private land, and has no intention to regulate or limit the use of the Wettermans’ private property, including private water rights. The Wettermans can graze, develop, or modify their private property as they see fit. However, during the exclusion periods and within the excluded areas livestock grazing shall not be authorized on public land for the duration of this decision.

The BLM is not requiring nor proposing that the Wettermans construct any new range improvements on any of their allotment under this decision. The BLM is not requiring the Wettermans to turn off or fence off any water on private land under this decision. In addition, no modifications or construction of new range improvements are proposed under this decision.

The range improvements on public lands established under a range improvement permit (BLM Section 4 permits) on the Cady Mountain Allotment include the Hidden Valley Well. This improvement is within the excluded area. BLM has the authority to determine the use of this range improvement under 43 CFR 4120.3-1(c), which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under § 4130.3-2 of this title.” As the owner of this range improvement, the Wettermans would still have full access to that well; however, livestock would be able to use this water location.

BLM has the authority (BLM v. Holland Livestock Ranch et.al, 39 IBLA 272 [Feb. 15, 1979]) to assume trespass on unfenced private lands within the exclusion area during the exclusion period.

6. Protest:

“The Cady Mountain Allotment contains no critical habitat for the desert tortoise, yet livestock are being excluded from 88,320 acres of noncritical habitat. The BLM has offered no proof that noncritical habitat exists, let alone offering a justification that this exclusion will benefit the desert tortoise.”

Response:

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does indeed have the authority for limiting grazing in these areas. This authority is contained in 43 CFR 4130.3-2 which states:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

Desert tortoise non-critical habitat equates to areas of desert tortoise Category III habitat which was instituted under Amendment 19 of the 1989/1990 amendments to the California Desert Conservation Area Plan (approved in June 1993).

7. Protest:

“The BLM proposes closing the water gaps on the Mojave River in Afton Canyon. There is no proof of harm to this area and no justification for this decision. These water gaps were developed by the BLM to allow livestock use of the River. This decision cannot stand.”

Response:

Monitoring data indicate that localized negative impacts to riparian habitat and water quality are occurring from cattle grazing along the Mojave River at Afton Canyon. BLM policy and regulations require the Bureau to maintain Proper Functioning Conditions at all riparian/wetland sites on public land and prevent negative impacts to water quality. The closure of Afton Canyon to livestock grazing is necessary to improve riparian habitat conditions and water quality.

8. Protest:

“Wettermans are authorized by the BLM to graze on the Cady Mountain and Cronese Lake Allotments year around. There is no rational basis to limit livestock grazing on those allotments if there is no decline in threaten or endangered species numbers nor any proven adverse impacts to tortoise habitat.”

Response:

The Cronese Lake Allotment is within critical habitat for the desert tortoise and the Cady Mountain Allotment is within non-critical habitat. The majority of the exclusion area is not grazed by your cattle on a regular basis. The BLM approved this decision to ensure protection of the desert tortoise and desert tortoise habitat from adverse impacts of cattle.

9. Protest:

“Even if the necessary ESA section 7 consultations have not been completed, to receive an injunction eliminating livestock grazing, the BLM must show actual adverse harm to species. Southwest Center

for Biological Diversity v. Forest Service, Civ. No 97/2562 (March 30, 2001). Neither the BLM nor the groups have met, nor can they meet, this burden.”

Response:

Currently, there is no injunction against grazing in the CDCA. We have prepared an EA on these grazing decisions and are consulting with the FWS on the overall CDCA Plan.

10. Protest:

“The range condition on the Wettermans’ allotments is in a stable or upward condition. The BLM has presented NO factual, monitoring or other evidence to show that the condition on the allotment requires this adjustment. Although the BLM claims its authority to limit grazing on this allotment is in compliance with 43 CFR 4110.3-2, that regulation requires that the authorized officer possess monitoring or other data to justify the reduction. The BLM has no such data in this case.”

Response:

BLM has determined that the allotment requires adjustment under the following authority rather than 43 CFR 4110.3-2. The authority under 43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth.
[Emphasis added.]

The rangeland health assessment conducted on the Cady Mountain Allotment in 2000 indicates that the Native Species Standard is not being achieved in a portion of the exclusion area. There are no planned reductions in stocking rates at this time for the Cady Mountain Allotment. There will be a slight reduction in permitted use for the Cronese Lake Allotment for the duration of this decision.

11. Protest:

“The EA advocates the elimination of grazing in “noncritical habitat areas.” As stated above this is neither legally allowed nor factually justified. There is no legal, regulatory or factual justification for limiting grazing in noncritical habitat areas. These areas do not exist as a matter of law.”

Response:

The EA does not permanently eliminate grazing in non-critical desert tortoise habitat in this decision. The BLM does have the authority for limiting grazing in these areas pursuant to 43 CFR 4130.3-2.

12. Protest:

“With one exception of a desert tortoise being trampled by livestock in a corral in Utah, neither the BLM nor the FWS can document a single example of desert tortoise “take” by livestock grazing.”

Response :

In addition to the above cited example, trampling of tortoises has been observed at other locations, including by cattle at the Littlefield study plot (pasture 2 of the Beaver Dam allotment) in Arizona in 1991; by cattle in Ivanpah Valley in California in 1993; and by sheep at the Kramer study plot in the western Mojave Desert (California) in 1981. The above observations involved the trampling of active burrows that collapsed on tortoises that were resting near the burrow exit. The above incidents were all observed in conjunction with tortoise studies at relatively small study sites. This suggests that other cases of direct take (i.e., actual killing or injuring of tortoises by trampling) would be documented if there were a systematic program underway to monitor such incidents wherever grazing is permitted in tortoise habitat.

As defined in the Endangered Species Act and its implementing regulations (50 CFR 17), the term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm in the context of this definition means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Tortoises may be harmed by the trampling of active (but unoccupied) burrows if it increases the risk of mortality because of exposure, increased energetic costs (to dig new burrows), or changes in activity time budgets (reducing the amount of time available for foraging because of the time required to build new burrows). Several studies have documented the destruction of tortoise burrows by trampling or the elimination of shade vegetation by grazing around tortoise burrows. Avery (1997) documented the partial or complete destruction of tortoise burrows at the Ivanpah Valley study site in 1993 and noted that the number of partially or completely destroyed burrows was greater outside (i.e., where grazing persists) than inside the cattle enclosure (where livestock were excluded). He also observed that tortoises located outside the cattle enclosure remained outside of their burrows all night significantly more often than tortoises located inside the enclosure. He concluded: “This is consistent with the occurrence of having more damaged burrows outside the cattle enclosure than inside the enclosure.”

For the above reasons, the protestants’ statement is neither accurate with respect to direct “take” (i.e. killing or injuring) of tortoises by trampling occupied burrows, or indirect take (i.e. harm) that is likely to result from the trampling of unoccupied tortoise burrows and removal of shade vegetation.

13. Protest:

“Issuance of a final decision that mirrors the Proposed Decision or selection of the preferred alternative in the Draft EA will detrimentally affect Wettermans’ livelihood. Even if they are able to secure the private pasture for their livestock “recommended” by the EA, they will lose their extensive capital investment in their ranch.”

Response:

The Bureau anticipates that these interim actions will result in a minimal disruption to the livestock operations for both allotments. The exclusion areas selected for these allotments are, for the most part, portions of these allotments where livestock grazing generally does not occur, or occurs infrequently.

14. Protest:

“Forcing the permittees to move their livestock during calving will result in extensive cattle weight loss, health problems and even livestock deaths.”

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential weight loss, health problems and animal deaths.

15. Protest:

“Wettermans’ livestock breeding program consists of livestock raised on the CDCA, not purchased from the outside. If forced to sell their livestock, they will never be able to achieve the quality of livestock they now have.”

Response:

Comment noted. If a lessee sells livestock, replacement heifers and livestock purchased from adjacent ranches may be available to replace the portion of livestock that was sold. The BLM acknowledges that cattle born and raised in the CDCA are better adapted to desert conditions.

16. Protest:

“According to California State Fish and Game Department, there has never been any evidence of disease transmission between cattle and bighorn sheep.”

Response:

The BLM is eliminating grazing in desert tortoise habitat with this decision, not bighorn sheep habitat.

17. Protest:

“The BLM has no legal, statutory or regulatory authority to physically move any of the permittees’ livestock at any time. This is considered harassment of livestock and will be reported to the local authorities.”

Response:

The BLM does indeed have the authority to physically remove a permittee's or lessee's livestock under certain conditions. If necessary, the BLM will comply with the following authorities: 43 CFR 4150.4:

Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under 4150.2 may be impounded and disposed of by the authorized officer as provided herein.

43 CFR 4150.4-1(a) requires that a written notice to impound the livestock be sent by certified mail or personally delivered to the owner or his agent, or both. If the owner is unknown or refuses to accept delivery of the notice to impound, a notice of intent to impound must be published in a local newspaper and posted at the county courthouse and at the nearest post office (43 CFR 4150.4-1(b)). Following the issuance of this notice, 43 CFR 4150-2 provides:

After 5 days from delivery of this notice under § 4150.4-1(a) of this title or any time after 5 days from publishing and posting the notice under § 4150.4-1(b) of this title, unauthorized livestock may be impounded without further notice any time within the 12-month period following the effective date of the notice.

18. Protest:

"The BLM has NO authority to force the permittees to construct fences or other improvements without compliance with the National Environmental Policy Act ("NEPA") and other federal statutes. Any decision which purports to force the permittees to construct any physical improvements without compliance with the federal statutes and regulations cannot stand."

Response:

The BLM is not requiring the Wettermans to construct any new range improvements on either the Cronese or Cady Mountain Allotments under this decision. BLM recognizes that NEPA compliance is required prior to constructing range improvements. NEPA will be completed for those projects on other allotments listed in the EA following BLM administrative procedures.

19. Protest:

"The BLM proposes to penalize trespass violations by eliminating additional grazing from the end of the grazing season. There is no regulatory authority for this decision, particularly since the trespass has not occurred. The BLM cannot pre-determine its penalties for alleged violations of the regulations."

Response:

The Bureau has authority under the regulations to specify the season of use and special terms and conditions that will apply to livestock grazing. BLM is required to make permits or leases subject to cancellation, suspension, or modification for any violation of these terms and conditions. In addition,

BLM may temporarily close areas to livestock grazing to abate unauthorized grazing use. Following are the details of these authorities:

43 CFR 4130.3 states:

Livestock grazing permits and leases shall contain the terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives of the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR 4130.3-1, Mandatory terms and conditions, states:

(a) The authorized officer shall specify the kind and number of livestock, *the period(s) of use*, the allotment(s) to be used, and the amount of use, in animal unit months, for every grazing permit or lease. The authorized livestock grazing used shall not exceed the livestock carrying capacity of the allotment. [Emphasis added.]

(b) All permits or leases shall be made subject to cancellation, *suspension*, or modification for any violation of these regulations or of any term or condition of the permit or lease. [Emphasis added.]

43 CFR 4130.3-2 states, in part:

The authorized officer may specify in grazing permits or leases other terms and conditions which will assist in achieving management objectives, provide for proper range management or assist in the orderly administration of the public rangelands. These may include but are not limited to:

(f) Provision for livestock grazing temporarily to be delayed, *discontinued* or modified to allow for the reproduction, establishment, or restoration of vigor of plants, provide for the improvement of riparian areas to achieve proper functioning condition or for the protection of other rangeland resources and values consistent with objectives of applicable land use plans, or to prevent compaction of wet soils, such as where delay of spring turnout is required because of weather conditions or lack of plant growth. [Emphasis added.]

43 CFR 4140.1 sets forth the acts prohibited on public lands. Among these are:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases:

(b) Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2:

(1) Allowing livestock or other privately owned or controlled animals to graze on or be driven across these lands:

(ii) In violation of the terms and conditions of a permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized.

(iii) In an area or at a time different from that authorized.

43 CFR 4150.2(d) authorizes BLM to temporarily close areas to grazing to abate unauthorized livestock use. Here is the pertinent language: “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

In addition to the authority set forth in 43 CFR 4150.2(d) to temporarily close areas to grazing, 43 CFR 4170.1-1(a) gives BLM the authority to suspend grazing use in whole or in part for violations of any of the provisions of 43 CFR, including the prohibited acts described above:

(a) The authorized officer may withhold issuance of a grazing permit or lease, or *suspend the grazing use authorized under a grazing permit or lease*, in whole or in part, or cancel a grazing permit or lease and grazing preference, or a free use grazing permit or other grazing authorization, in whole or in part, under subpart 4160 of this title, for violation by a permittee or lessee of any of the provisions of this part.
[Emphasis added.]

20. Protest:

“The BLM has failed to adequately discuss (consult, cooperate or coordinate) any of these proposed action with the affected permittees in violation with 43 CFR 4110.3-3(a).”

Response:

During preparation of the EA, BLM contacted Mrs. Wetterman. Mrs. Wetterman referred BLM to her attorney to discuss issues regarding this matter.

21. Protest:

“The BLM may only require that the permittee maintain those range improvements which directly benefit their livestock operation. The BLM’s requirement that the permittee maintain proposed improvements when those improvements will not benefit their operation is a violation of agency

requirements.”

Response:

The BLM has the authority to require a lessee to maintain range improvements on public land within his/her allotment. This authority is contained in 43 CFR 4120.3-1(c) which states, “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

22. Protest:

“In many cases, livestock removal from these allotments would take many weeks to complete, and would cause far more disturbance than allowing the livestock to remain well dispersed throughout the range. The EA is flawed because it fails to recognize the detrimental impact to both the livestock and the range of forcing the confinement and removal of these livestock. Although the EA states that livestock would have to be removed within 48 hours notification, in most cases, it would be physically impossible to comply with that requirement.”

Response:

Increased planning and early, gradual movement of livestock out of exclusion areas should reduce any potential impacts to the livestock and the range. The 48 hour removal requirement refers to the removal of livestock that have drifted into the exclusion area when the exclusion period is in affect. BLM does not anticipate large numbers of livestock drifting into the exclusion areas. BLM believes that 48 hours is a reasonable time frame for removal of small numbers of livestock from any given exclusion area.

23. Protest:

“The economic impact of implementation of this EA on the County and local area will be significant. Although the EA “suggests” that finding alternative private pasture would be the most cost effective for the permittees, in fact there is very little private pasture available. Thus, the permittees impacted by the EA will simply be forced out of business.”

Response:

This decision is interim in nature. Therefore, the loss of revenue for Inyo, Kern, and San Bernardino Counties will be short term. The EA estimates that a loss of county revenue of \$6,012 will result. This is approximately 11 percent of the grazing receipts collected and returned to Kern, Inyo, and San Bernardino Counties in 2000.

BLM conducted a social and economic analysis for the EA. See Social and Economic Values section of the EA.

24. Protest:

“San Bernardino County was not consulted about the proposed EA in violation of NEPA.”

Response:

A copy of the EA was sent to San Bernardino County on or about April 9, 2001. Comments on the EA were received from two San Bernardino County officials. In addition, according to the NEPA regulations at 40 CFR 1503.1, public comment is a requirement only after preparing a draft environmental impact statement (EIS) and before preparing a final EIS. For this decision, an environmental assessment (EA) was prepared and 40 CFR 1503.1 is not applicable. The 15-day comment period was provided as a courtesy.

25. Protest:

“The statement in the EA that trend can be ascertained by “observation of grazing intensity of the key species” is ludicrous. Trend cannot be established without proper monitoring studies, completed over time.”

Response:

The statement in the EA inadvertently left out the word “apparent” before “trend.” “Apparent trend” is defined by the Society for Range Management as:

An interpretation of trend based on a single observation. Apparent trend is described in the same terms as measured trend except that when no trend is apparent it shall be described as “none.” Note: Some agencies utilize the following definition: “An assessment, using professional judgment, based on a one-time observation. It includes consideration of such factors as plant vigor, abundance of seedlings and young plants, accumulation or lack of plant residues on the soil surface, soil surface characteristics, i.e., crusting, gravel pavement, pedicled [sic] plants, and sheet or rill erosion.” [Source: Jacoby, P.W., ed. 1989. A glossary of terms used in range management, 3rd edition. Society for Range Management, Denver, CO.]

26. Protest:

“There is no monitoring or other data supporting BLM’s conclusion that invasive, non-native species would decrease with the elimination of livestock grazing.”

Response:

Data are available to support BLM’s conclusion.. In studies in the Western Mojave Desert, there is evidence that annual invasive species of Mediterranean grass (*Schismus arabicus* and *Schismus barbatus*), red brome (*Bromus madritensis* ssp. *rubens*) and filaree (*Erodium cicutarium*) increase in response to disturbance, including that related to livestock grazing (Brooks 1999a and 1999b; Brooks 2000a and 2000b). Biomasses of these species was generally highest in washlets, under creosote bushes, and unprotected areas. Mediterranean grass is particularly abundant where grazing and other human disturbance activities have reduced cover and disturbed the soil (Brooks 2000b). It is

expected that seasonal or total exclusion of cattle from public lands within allotments would decrease site disturbance, resulting in increases in native annuals and perennials and a concomitant decrease in the biomass of invasive species. The references cited above have been added to the Decision Record.

27. Protest:

“Wettermans agree that continued grazing does not pose an imminent threat of significant resource damage (in fact, there is NO threat of resource damage resulting from Wetterman’s proper grazing practices.). Wettermans agree with the BLM’s determination that the implementation of the EA and proposed decision do not have to occur on an emergency basis.”

Response:

The BLM has evaluated allotments to determine whether conditions warrant emergency action in accordance with 43 CFR 4110.3-3 (b). BLM has determined that conditions, while serious, do not constitute an emergency at this time. Continued grazing does not pose an “imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in this allotment.

29. Protest:

“Without the permittees in the CDCA, the incidents of vandalism and desert destruction will rise. In the California desert, ranchers have to share their holdings with the multitude of public land users, some of whom are not responsible people. Vandalism occurs far to frequently and ranchers are constantly maintaining range improvements because of vandalism.”

Response:

Because these actions are interim, and few if any range improvements exist in the exclusion areas, BLM anticipates that levels of vandalism will remain approximately the same. Maintenance of range improvements is assigned according to cooperative range improvement agreements and range improvement permits. Maintenance will still be required on range improvements within the excluded portions of both allotments during the interim period.

30. Protest:

“Because ranchers are willing to spend the time maintaining their improvements, water is available to wildlife as well as livestock. The BLM’s decision is flawed because it fails to recognize the harm of fencing off water sources to wildlife.”

Response

Maintenance of range improvements owned by BLM are the responsibility of the lessee and are a part of the grazing lease. We agree that wildlife benefits from lessee maintenance of range improvements.

FINAL DECISION

After further analysis, it is my final decision that livestock grazing shall not be authorized in the area of seasonal exclusion within the Cronese Lake Allotment, an area which encompasses 18,000 acres of critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record and 43 CFR 4110.3-2 (b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities which are described in the Authority section of this decision. This decision shall modify the way your livestock use the Cronese Lake Allotment to protect the desert tortoise and its habitat and enhance forage conditions, establish the period for this modification, and set parameters for livestock use. The exclusion area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Cronese Lake Allotment shall not exceed 13,383 animal (cattle) days for the year. The permitted use for the Cronese Lake Allotment shall be temporarily reduced to 444 AUMs. These modifications on the Cronese Lake Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

It is also my final decision that livestock grazing shall not be authorized in the area of seasonal exclusion within the Cady Mountain Allotment. This exclusion area comprises approximately 88,320 acres of desert tortoise non-critical habitat. This area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. In addition, water at Hidden Valley Well shall not be available to livestock during the exclusion periods for the duration of this decision. Livestock grazing in the Cady Mountain Allotment shall not be permitted along or within the Mojave River at Afton Canyon for the duration of this decision. To facilitate the interim closure of the Afton Canyon portion of the Cady Mountain Allotment the construction of gap fences at the western and eastern ends of the canyon shall be implemented through this decision. The Livestock Use Agreement for the management of livestock in Afton Canyon shall be cancelled. These modifications on the Cady Mountain Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If, during the periods of exclusion, cattle are found in the exclusion areas you will have 48 hours after notification from the BLM to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Cady Mountain and Cronese Lake Allotments will be denied.

This Final Grazing Decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD)

for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment or January 31, 2002, whichever shall be later.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion implemented. These grazing decisions are a result of BLM’s understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM’s decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire’s thrasher, Le Conte’s thrasher, spotted bats, Townsend’s big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert.

BLM's decision is needed to ensure protection of the desert tortoise and critical and non-critical habitat. This need outweighs the minor and temporary adverse impacts that would result to ranching from the closures. The decision will result in the temporary removal of livestock grazing from 18,000 acres of desert tortoise critical habitat within the BLM administered Cronese Lake Allotment and 88,320 acres of non-critical habitat. BLM recognizes that the affected allotments provide a source of income and employment to the ranching community in the region and contributes goods and services to the area.

The Cronese Lake and Cady Mountain lessees may be able to move livestock to other areas of the allotments during the seasonal closure with a minimum disruption to existing operations. The lessees may also utilize other options including placing livestock on private pasture, if available, or removing all of their livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which states in pertinent parts:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is

determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation , cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4120.3-1 (c): “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

43 CFR 4120.3-2 (a): “The Bureau of Land Management may enter into a cooperative range improvements or rangeland developments to achieve management or resource condition objectives. The cooperative range improvement agreement shall specify how the costs or labor, or both, shall be divided between the United States and cooperators(s).”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time

different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice to the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and

(4) whether the public interest favors granting the stay.

Sincerely,

/s/

Tim Read
Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Ridgecrest Field Office
300 South Richmond Road
Ridgecrest, CA 93555-4436



May 15, 2001

IN REPLY REFER TO:

4000(P)

GR# 046536

(CA-650.32)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Walker Pass Common Allotment, #05014, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current permit, #046535, authorizes 1,219 animal unit months (AUMs), equivalent to 153 head of cattle from November 1 to June 30 on the Walker Pass Common allotment. Your use area in the allotment encompasses 33,635 acres, including 950 acres of private land, 385 acres of state land, and 32,500 acres of BLM land. On BLM administered land within the allotment there are 32,058 acres of non-critical habitat for the desert tortoise. Your use area contains 6,387 acres of non-critical habitat for the desert tortoise.

This final grazing decision, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. No protest of the proposed decision was received from you.

FINAL DECISION

After further analysis, it is my final decision that cattle grazing will not be authorized in the seasonal exclusion area which encompasses 6,387 acres of non-critical habitat for the desert tortoise. This area depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, 43 CFR § 4130.3, 4110.3-3(a) and 4140.1(b)(1)(ii)(iii), and other authorities, which are described in the Authority section of this decision. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. These modifications on the Walker Pass Common Allotment shall be incorporated into your current grazing permit as terms and conditions as long as the grazing decision remains in effect. This decision does not effect the permitted use on the allotment because cattle can graze the perennial forage allocation outside of the seasonal exclusion periods.

If during the periods of exclusion, cattle are found in the exclusion areas you will have 48 hours after notification from the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see authority section). An additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Walker Pass Common Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

This Final Grazing Decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or January 31, 2002, whichever shall be later.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose

to address the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) and Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert. The decision will result in the temporary closure to livestock grazing on 6,387 acres of desert tortoise critical habitat on your use area in the Walker Pass Common Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

AUTHORITY

The authority for this proposed decision is contained in Title 16 of the United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

4110.3-3 (a): "After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section".

43 CFR 4130.3: "Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part."

43 CFR 4140.1 (b) (1) (ii)(iii): "Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized."

43 CFR 4150.2(a): "Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or

both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice to the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

43 CFR 4150.2(d): “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Ridgecrest Field Office, 300 S. Richmond Road, Ridgecrest, CA 93555-4436 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted. The following standards apply to any petition for a stay.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards.

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and

(4) whether the public interest favors granting the stay.

Sincerely,

/s/

Hector Villalobos

Ridgecrest Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record

Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Ridgecrest Field Office
300 South Richmond Road
Ridgecrest, CA 93555-4436



May 15, 2001

IN REPLY REFER TO:

4000(P)

GR# 046534

(CA-650.32)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Walker Pass Common Allotment, #05014, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current permit, #046534, authorizes 857 animal unit months (AUMs), equivalent to 107 head of cattle from November 1, through June 30 on the Walker Pass Common Allotment. Your use area in the allotment encompasses 14,788 acres, including 847 acres of private land, and 13,941 acres of BLM land. On BLM administered land within the allotment, there are 32,058 acres of non-critical habitat for the desert tortoise. Your use area contains 6,865 acres of non-critical habitat for the desert tortoise.

This final grazing decision, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area (CDCA) Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under the CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotment to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. No protest of this decision was received from you.

FINAL DECISION

After further analysis, it is my final decision that cattle grazing will not be authorized in the seasonal exclusion area which encompasses 6,865 acres of non-critical habitat for the desert tortoise located in your use area. This area depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, 43 CFR § 4130.3, 4110.3-3(a) and 4140.1(b(1))(ii)(iii), and other authorities, which are described in the Authority section of this decision. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. These modifications on the Walker Pass Common Allotment shall be incorporated into your current grazing permit as terms and conditions as long as the grazing decision remains in effect. This decision does not effect the permitted use on the allotment because cattle can graze the perennial forage allocation outside of the seasonal exclusion periods.

If during the periods of exclusion, cattle are found in the exclusion areas you will have 48 hours after notification from the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see Authority section). An additional day will be added onto the exclusion period for every day cattle remain in trespass.

Applications received to graze during years of approved non-use on the Walker Pass Common Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

This Final Grazing Decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or January 31, 2002, whichever shall be later.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall CDCA Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a biological opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicles, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 6,865 acres of desert tortoise habitat on your use area within the Walker Pass Common Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

You may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. You may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented

agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Ridgecrest Field Office, 300 South Richmond Road, Ridgecrest, CA 93555-4436 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this

decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Hector Villalobos
Ridgecrest Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Ridgecrest Field Office
300 South Richmond Road
Ridgecrest, CA 93555-4436



May 15, 2001

IN REPLY REFER TO:

4000(P)

GR# 046525

(CA-650.32)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Rudnick Common Allotment, #05008, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current permit, #046525, authorizes 6,735 animal unit months (AUMs), equivalent to 739 head of cattle season long on the Rudnick Common Allotment. The allotment encompasses 236,184 acres, including 86,030 acres of private land, and 150,154 acres of BLM land. On BLM administered land within the allotment, there are 62,503 acres of non-critical habitat for the desert tortoise.

This final grazing decision, based upon the enclosed decision record modifies the way your cattle can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification to the way your cattle can use the allotment to protect desert tortoise and its habitat, establishment of the period for this modification of parameters for cattle use. A timely protest of the proposed decision was received from you on April 24, 2001. I have considered the protest statement of reasons as to why you believe the proposed decision was in error and have responded the reasons below.

RESPONSE TO PROTEST STATEMENT OF REASONS

Protest: “There are no known tortoises on this land you are stating that is potential. I do not feel that this is strong enough to deny me my grazing that has been in effect for over 60 years.”

Response: Tortoises and active burrows have been observed within the boundaries of the exclusion area within this allotment.

FINAL DECISION

After further analysis, it is my final decision that cattle grazing shall not be authorized in the seasonal exclusion area which encompasses 31,000 acres of non-critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, 43 CFR § 4130.3, 4110.3-3(a) and 4140.1(b)(1)(ii)(iii) and other authorities, which described in the Authority section of this decision. This decision shall modify the way your livestock use the Rudnick Allotment. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. These modifications on the Rudnick Common Allotment shall be incorporated into your current grazing permit as terms and conditions for grazing use as long as the grazing decision remains in effect. This decision does not effect the permitted use on the allotment because cattle can graze the perennial forage allocation outside of the seasonal exclusion periods.

If during the periods of exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a),(b) (see Authority section). An additional day will be added onto the exclusion period for every day cattle remain in trespass.

Applications received to graze during years of approved non-use on the Rudnick Common Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

This Final Grazing Decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or January 31, 2002, whichever shall be later.

A fence was constructed along Kelso Creek to protect the riparian area from livestock grazing. Maintenance for the Kelso Creek Riparian Fence will not be your responsibility.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted

with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to address the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) and Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM’s understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM’s decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire’s thrasher, Le Conte’s thrasher, spotted bats, Townsend’s big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM’s decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and

implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 31,000 acres of desert tortoise non-critical habitat on the Rudnick Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Rudnick lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of their livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

43 CFR 4110.3-2 (b): "When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices."

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Ridgecrest Field Office, 300 S. Richmond Road, Ridgecrest, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have

the burden of proof to demonstrate why a stay should be granted. The following standards apply to any petition for a stay.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards.

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Hector Villalobos
Ridgcrest Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Ridgecrest Field Office
300 South Richmond Road
Ridgecrest, CA 93555-4436



May 15, 2001

IN REPLY REFER TO:

4000(P)

GR# 046522

(CA-650.32)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Hansen Common Allotment, #05006, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize grazing on ephemeral forage and an established perennial forage allocation. Your current permit, #046522, authorizes 354 Animal Unit Months (AUMs) of forage, equivalent to 141 head of cattle from December 1 to September 30 on the Hansen Common Allotment. The allotment encompasses 72,102 acres, including 37,254 acres of private land, and 34,848 acres of BLM land. On BLM-administered lands within the allotment, there are 3,500 acres of non-critical habitat for the desert tortoise.

This final grazing decision, based upon the enclosed decision record, modifies the way your livestock can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and sets parameters for livestock use.

BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area (CDCA) Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15-day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification to the way your cattle can use the allotment to protect desert tortoise and its habitat, establishment of the period for this modification of parameters for cattle use. No protest of this decision has been received from you.

FINAL DECISION

After further analysis, it is my final decision that livestock grazing will not be authorized in the total exclusion area which encompasses 3,500 acres of non-critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record and 43 CFR § 4130.3, 4110.3-3(a) and 4140.1(b)(1)(ii)(iii) which is described in the Authority section of this decision. These modifications on the Hansen Common Allotment shall be incorporated into the current grazing permit as terms and conditions as long as the grazing decision remains in effect. This decision does not affect the permitted use on the Hansen Common Allotment because the exclusion area is located in the ephemeral portion of the allotment which does not have an AUM allocation.

If during the periods of exclusion, cattle are found in the exclusion areas you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b). Reduction in the number of animal days per year would occur when livestock are found again (second offense) in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

Applications received to graze during years of approved non-use on the Hansen Common Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

As stated in the court approved settlement agreement, this Final Grazing Decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or January 31, 2002, whichever shall be later.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall CDCA Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM-administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to settle the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the Biological Opinion is implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the effects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicles, mining and other activity in the desert. The decision will result in the temporary removal of livestock grazing from 3,500 acres of desert tortoise non-critical habitat on the Hansen Common Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the ranching community in the region and contributes goods and services to the area.

The Hansen Common lessee may be able to move livestock to other areas of the allotment during the seasonal closure with a minimum disruption to existing operations. The lessee may also utilize other options including placing livestock on private pasture, if available, or removing all of his livestock from the allotment and later replacing the livestock after the time period of the exclusion ends.

AUTHORITY

The authority for this decision is contained in Title 16 United State Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4130.3: "Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part."

43 CFR 4140.1 (b)(1) (ii)(iii): "Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized."

43 CFR 4150.2(a): "Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3."

43 CFR 4150.2(b): "Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer."

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Ridgecrest Field Office, 300 S. Richmond Road, Ridgecrest, CA 93555 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Hector Villalobos
Ridgecrest Field Manager

cc: Tim Salt
Members of Interested Public

Enclosures:

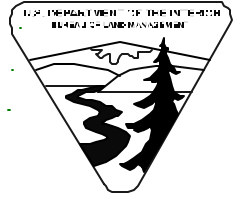
Decision Record
Map



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Ridgecrest Field Office
300 South Richmond Road
Ridgecrest, CA 93555-4436



May 15, 2001

IN REPLY REFER TO:

4000(P)

GR# 046527

(CA-650.32)

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

NOTICE OF FINAL GRAZING DECISION

Dear

INTRODUCTION

The Tunawee Common Allotment, #05009, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current permit, #046527, authorizes 1,540 animal unit months (AUMs), equivalent to 608 head of cattle for a 2.5 month season on the Tunawee Common Allotment. The allotment encompasses 55,931 acres, including 4,202 acres of private land and 51,727 acres of BLM land. On the BLM-administered lands within the allotment there are 1,800 acres of non-critical habitat for the desert tortoise.

This final grazing decision, based upon the enclosed decision record, modifies the way your cattle can use the allotment to protect the desert tortoise and its habitat, establishes the period for this modification, and sets parameters for cattle use.

BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, including grazing, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on an overall plan is complex and the completion date uncertain. Absent consultation on the entire plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of consultation on the plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the plan. These interim agreements allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with 7 (a)(1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA Plan in accordance with 7(d) for the ESA. On January 29, 2001, the stipulation respecting livestock grazing became effective.

The BLM issued a proposed decision and Environmental Assessment (EA) which were available for a 15 day protest and public comment period. On April 9, 2001, you were sent an EA and my Notice of Proposed Decision regarding modification of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification and parameters for cattle use. No protest of the proposed decision was received from you.

FINAL DECISION

After further analysis, it is my final decision that cattle grazing will not be authorized in the total exclusion area which encompasses 1,800 acres of non-critical habitat for the desert tortoise. This area, depicted in green, is shown on the enclosed map. My decision is based upon the enclosed decision record, 43 CFR § 4130.3, 4110.3-3(a) and 4140.1(b)(1)(ii)(iii), and other authorities, which are described in the Authority section of this decision. These modifications on the Tunawee Common Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect. This decision does not affect the permitted use on the Tunawee Common Allotment because the exclusion area is located in the ephemeral portion of the allotment which does not have an AUM allocation.

If during the total exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b). Reduction in the number of animal days per year would occur when livestock are found again (second offense) in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

Applications received to graze during years of approved non-use on the Tunawee Common Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

This Final Grazing Decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or January 31, 2002, whichever shall be later.

RATIONALE

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to address the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. This decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) and Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in the enclosed decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

This decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision would provide the highest level of protection for the desert tortoise and its habitat among the three alternatives analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will slightly improve existing resource conditions for the tortoise and other listed and special status species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert. The decision will result in the temporary closure to livestock grazing of 1,800 acres of desert tortoise habitat on the Tunawee Common Allotment administered by the BLM.

BLM recognizes that the affected allotment provides a source of income and employment for the

ranching community in the region and contributes goods and services to the area.

AUTHORITY

The authority for this proposed decision is contained in Title 16 United States Code and Title 43 of the Code of Federal Regulations which state in pertinent parts:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

4110.3-3 (a): "After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section".

43 CFR 4130.3: "Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part."

43 CFR 4140.1 (b) (1) (ii)(iii): "Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized."

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice to the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

43 CFR 4150.2(d): “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

RIGHT OF APPEAL

If you, or other individuals believe they are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Ridgecrest Field Office, 300 South Richmond Road, Ridgecrest, CA 93555-4436 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted. The following standards apply to any petition for a stay.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards.

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;

- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

Hector Villalobos
Ridgecrest Field Manager

cc: Tim Salt, District Manager
Members of Interested Public

Enclosures:

Decision Record
Map